Supreme Court, U.S.
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No. 94-51

# In The Supreme Court of the United States

October Term, 1994

GEORGE JONES,
*Petitioner*,

v.

SIMON & SCHUSTER, INC.,
AND SILVER BURDETT & GINN
*Respondents*

## PETITION FOR WRIT OF CERTIORARI

## AND APPENDIX

EDDIE D. SMITH
*Attorney for Petitioner*
719 Griswold, Suite 500
Detroit, Michigan 48226
(313) 963-6271

45 pp

## QUESTIONS PRESENTED

Whether arbitrary dismissal of petitioner's Title VII (USCA 42 Section 2000(e) et. seq. is justified where trial court has:

I. Totally ignored the literal meaning of FRCP 26 in its entirety by refusing to enforce its provisions in response to proper request and motion for discovery by petitioner, while granting every motion filed by respondents, even to excluding the calling by petitioner of witnesses not a party to the action;

II. Misconstrued, misinterpreted or ignored the facts, case law, Federal Rules of Civil Procedure, and statutory precepts which control civil discovery proceedings in the federal courts:

A. Accepted unsubstantiated allegations made by respondent, as fact, without a hearing being conducted for the purpose of determining its veracity;

B. Accepted unsubstantiated allegations made by respondent regarding petitioner's refusal to complete discovery proceedings and totally ignored or refused to consider correspondence between counsels, offered in a motion to supplement the appellate record, accompanied by proposed exhibits, proffered by petitioner, which indisputably refute the false allegation made by respondent that, "Jones never testified or produced the previously ordered materials;"

C. Alleged or ruled prejudicial harm to the respondents by petitioner's refusal to complete discovery in the absence of any basis or support of findings;

D. Arbitrarily denied petitioner's motion for recusal of itself and the magistrate judge attached/assigned to it;

E. Issued the order dismissing petitioner's complaint while respondents' motions, (a) for extension of time in which to take petitioner's deposition was pending; (b) while respondents' motion for clarification was pending; and

(c) subsequent to adjournment of petitioner's scheduled deposition, for May 11 and May 12, 1992, the deposition was cancelled by respondents;[1]

F. Not being fully aware of the true status of the case while making its rulings without due consideration which amounted to a denial of due process and equal protection of the law pursuant to United States Constitution, Amendment Fourteen.

III. Does the U.S. Court of Appeals for the Sixth Circuit have the power to restrain U.S. District Courts from abusing their authority, usurping power and nullifying Federal Rules of Civil Procedure through reckless disregard for those rules and related or supporting statutes?

IV. Does the conduct of a U.S. District Judge who disregards the rights of a party plaintiff engaged in litigation pursuant to Title VII, 42 USCA Section 2000(e) et. seq., to discovery constitute a denial of due process?

V. Is it error for a U.S. District Judge, to dismiss plaintiff's Title VII case in the absence of notice of a time and place given by the opposing party for continuance of discovery proceedings?

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[1]On June 19, 1991, counsel for petitioner informed respondents, by letter, that deposition dates set for July 9th and 10th were not good dates because of the schedule of petitioner's counsel. Alternative deposition dates of July 17, 18 and 19, 1991 and any days in the weeks of July 23 and July 29, 1991 were suggested.

And, on April 29, 1992, respondents cancelled deposition dates scheduled for May 11 and May 12, 1992. Respondents' letter stated: ". . . due to the fact that respondents should have a motion to dismiss pending before the Court which should resolve this case in its entirety, there is no reason to waste the time or money to continue George Jones' deposition on May 11 and May 12, 1992. Accordingly I am cancelling those two deposition days at this time."

The deposition was not rescheduled. The case was dismissed and the basis for dismissal given by the Honorable George LaPlata was: "failure to cooperate in discovery." (Order Granting Motion to Dismiss)

## PARTIES

George Jones, Petitioner

Simon & Schuster, Inc., a New Jersey corporation
Silver, Burdett & Ginn, a New Jersey corporation,
Respondents

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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George Jones, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled cause on March 17, 1994.

## OPINIONS BELOW

The March 17, 1994 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is not reported and is reprinted in Appendix A to this Petition, PP A1-A5; The March 11, 1993 Order of the Court of Appeals Granting Dismissal of Appeal is not reported and is reprinted in Appendix A to this Petition, PP A6-A7; The December 2, 1992 Order of the Court of Appeals Granting Dismissal of Appeal is not reported and is reprinted in Appendix A to this Petition, PP A8-A9; The

March 2, 1992 Order of the Court of Appeals Denying Petition for Writ of Prohibition or Mandamus is not reported and is reprinted in Appendix A to this Petition, PP A10–A11. The prior opinion of the U.S. District Court for the Eastern District of Michigan entered on August 25, 1993 is not reported and is reprinted in Appendix B to this Petition, PP B1–B2; The prior opinion of the U.S. District Court for the Eastern District of Michigan entered on February 26, 1993 is not reported and is reprinted in Appendix B to this Petition, PP B3–B5; The prior opinion of the U.S. District Court for the Eastern District of Michigan entered on January 4, 1993 is not reported and is reprinted in Appendix B to this Petition, PP B6–B12; The prior opinion of the U.S. District Court for the Eastern District of Michigan entered on December 21, 1992 is not reported and is reprinted in Appendix B to this Petition, PP B13–B15; The prior opinion of the U. S. District Court for the Eastern District of Michigan entered on August 24, 1992 is not reported and is reprinted in Appendix B to this Petition, PP B16–B17.

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on March 17, 1994. The jurisdiction of this Court is invoked pursuant to 28 USC Section 1254(1).

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

Federal Rules of Civil Procedure 26, 34 and 37.

## STATEMENT OF THE CASE

This is an employment discrimination case (Title VII; USCA 2000(e), et. seq.), brought by George Jones, a black sales representative employed by the corporate respondents at all times relevant to this case . . . The gist of the case is disparate treatment based on race.

At all times relevant to this case, petitioner was employed by the corporate respondent, Simon & Schuster, Inc., and assigned by that corporation to work directly under the authority and supervision of Silver, Burdett & Ginn, a subsidiary of Simon & Schuster, Inc.

On October 6, 1989, a memo over the signatures of Stanley Walden and Robert Crisp, members of the Detroit Board of Education/Curriculum Committee, in which adoption by the Detroit Public School system of the Silver Burdett & Ginn K8 Series, 1988 Edition (components of the music curriculum — matching the vocal music texts) was recommended, and forwarded to Ellen Stephens, with copies to Norman McRae, Director, Fine Arts and Social Studies and to Kay Everett, Board (of Education) member, Detroit Public Schools.

The recommendation was followed; the Silver Burdett & Ginn K08, 1988 Edition, was adopted and purchased by the Detroit school system.

Petitioner, George Jones, was the sales representative directly responsible for the adoption and purchase of the music program by the Detroit Board of Education.

On October 9, 16, the order was processed and shipped . . . Prior to 1989, due to the efforts of petitioner, the Detroit Board of Education covering the adoptive periods of 1986–1987/1987–1988, the Detroit Board of Education adopted the English and Science programs published and sold by Silver Burdett & Ginn.

At a time when musch of the work necessary to securing the order by George Jones was being performed, he became ill, (job-related stress was involved) and had to be hospitalized . . . Robert Wakeham, a white employee of the respondents, became his manager; Mr. Wakeham took full advantage of petitioner's illness and, through his new position, was able to claim credit for the adoption relative to which petitioner had worked so hard.

As a result, petitioner filed a grievance against Archie Jordan, who was then Divisional Manager and Vice President of respondents, and others . . .

Subsequently, the Detroit Board of Education and the Detroit Federation of Teachers entered into the agreement upon which the 1989 order was predicated:

A. On July 1, 1989, the Detroit Board of Education entered into a contract to run through June 30, 1990;

B. The subject contract provided:

"A. For academic subjects from Primary — Grade 5 — each classroom teacher will be supplied with an additional set of Board approved academic textbooks.

"B. Prior to the implementation of major new programs or major changes in curriculum, each teacher involved in the program shall be provided with all the necessary supplies and material related to the program as determined by the Textbook Selection Committee or the committee that developed the new program."

The intent and authority relative to the purchase of the additional Science and English textbooks is evidenced by the legend reflected on one of the last pages of the subject contract.

On the basis of the statement, "For academic subjects from primary-grade 5, each classroom teacher will be supplied with an additional set of board approved academic textbooks . . .", the petitioner herein, pursuant to a letter of authorization signed by Kay Everett and addressed to Mr. Paul Cox, in conjunction with the Music Department, the English Department and the Science Department of the Detroit Board of Education, prepared an order for English and Science textbooks, to be shipped to the Detroit Board of Education.

The 3.3 million dollar order was express mailed to Paul Cox at least one week before being processed; the said order was not a new order but represented replacements of lost or damaged materials incidental to the earlier adoption of the Science and English programs of the respondent by the Detroit Board of Education; the order also represented a good faith attempt to conform to the terms of the agreement reached by and between the Detroit Board of Education and the Detroit Fed-

eration of Teachers which was signed by John W. Porter, Interim General Superintendent, on September 6, 1989.

The order was entered into the company computer system with the full knowledge, understanding, cooperation and approval of petitioner's supervisors, Paul Cox, Archie Jordan and Robert Wakeham . . .

The order was not new; neither was it predicated on or represented to be predicated upon a new adoption; It quite simply epitomized conformity and compliance with the terms of the aforementioned contract between the Detroit Board of Education and the Detroit Federation of Teachers.

The manner in which it was filled was not violative of Board or Company policy; i.e., both had approved of and utilized a piggy back policy in appropriate circumstances prior to the incidents herein reflected.

In fact, on October 16, 1989, petitioner herein was informed that the order regarding the Science and English materials, valued at 3.3 million dollars, had been processed; however, petitioner was surprised that Paul Cox had failed to exchange the 1988 copyright materials for 1990 copyright materials and/or held the order until the exchange could be accomplished, pursuant to representations made to the School Board by the company.

As a result of the failure to exchange the copyright materials, and to conform to other shipping requirements, petitioner herein requested on October 17, 1989 that the initial order be returned to the warehouse; (Actually, the request represented an attempt on the part of petitioner to correct Mr. Cox's error in failing to substitute the 1990 copyright for the 1988 copyright without embarassing Mr. Cox, and stemmed from the fact that the incoming (new) deputy superintendent wanted the 1990 copyright in lieu of the 1988 copyright which had been ordered by the outgoing deputy superintendent.)

On October 1, 1989, the order had been discussed by petitioner with Paul Cox and Archie Jordan; both approved of the manner in which the order was to be filled and in fact autho-

rized and fully participated in effectuating filling out the order by piggy back, the same being or representing an accepted and customary manner of filling orders incidental to a prior adoption.

Because of the monetary value of the order, it was closely scrutinized by supervisory personnel assigned to respondent's home office located in the State of New Jersey . . . The close scrutiny resulted in a refutation of the order by Kay Everett who, because she was a candidate for a seat on the Detroit City Council, did not want the materials to arrive in the Board of Education warehouse until after the election on November 7, 1989.

The rejection of her authorization of the order by Kay Everett led to the rejection of the order by the company and the false and unfair assigning of blame to petitioner.

Petitioner, in an effort to resussitate the order, requested that Paul Cox and Mitch Grossman, two supervisory officers of the respondent, come to Detroit for a meeting with Kay Everett . . .

His request was not honored; instead, on October 27, 1989, Robert Alcorn and Mitch Grossman initiated a telephone conference with George Jones relative to the origination of the order . . . Pursuant to several conferences among company supervisory personnel, attention was focused on petitioner's expense accounts which had been approved by both Paul Cox and Archie Jordan, his supervisors, and forwarded to Robert Alcorn at the home office of the respondent.

The several conferences among the respondent's supervisory personnel resulted in two more of the company's administrators and/or supervisory personnel, Amryl P. Ward and Robert Wakeham, becoming active figures/players in this big business system/ploy employed by the respondent's personnel in an attempt to politicize a touchy situation to their advantage, as exemplified by a letter addressed to Doug Nash over the signature of Amryl P. Ward on November 17, 1989 and by subsequent events.

On Tuesday, December 12, 1989, at the request of administrative personnel employed by the respondent, petitioner attended a meeting at the office of Mark J. Lawless and Ms. Ward.

Without prior notice or warning to petitioner, the meeting evolved into an exit interview, conducted primarily by Mr. Lawless, an attorney in the employ of respondent. Mr. Lawless, acting in behalf of the respondent, terminated Mr. Jones' employment with respondent, including its subsidiary, Globe Publishing Company, which had hired petitioner, effective November 6, 1989, subsequent to his resignation from respondent.

Although petitioner's resignation from the respondent became effective on November 6, 1989, the date on which he became an employee of Globe Publishing Company, the respondent, through its agent, Amryl P. Ward, forwarded a letter to Doug Nash, his then supervisor, alleging "a series of discrepancies on George's part in securing the 3.3 million dollar offer from Detroit" and strongly "advising that Mr. Nash discuss the matter with Mr. Jones.

From this point, to the filing of petitioner's complaint, charges and counter-charges of bad faith and wrongful conduct were exchanged between the parties.

On March 28, 1991, petitioner filed his complaint charging employment discrimination on the basis of race!

From the date of the filing of petitioner's complaint, the posture of the case rapidly disintegrated, with petitioner requesting discovery, filing motions to compel and for sanctions, and being frustrated at every turn by the absolute refusal of respondent to furnish the requested discovery and the trial court at every turn upholding every violation of the discovery rules by respondent. The Court also accepted every misrepresentation by the respondent concerning the status of the discovery proceedings; the end result was dismissal of petitioner's complaint by the Hon. George LaPlata on March 17, 1994, on the basis of unsubstantiated allegations made by respondents:

**Compliance With Discovery Requests/Demands by Respondent**

A. On September 10, 1991, petitioner answered respondent's first set of interrogatories and second request for pro-

duction of documents. (Answers not provided were objected to on the basis of relevancy; however, over 60 pages of employment records, income and tax records were provided, as requested by respondent.)

B. On April 24, 1992, petitioner, in response to a demand for production of records, forwarded a copy of Mr. Jones' medical records, secured from the National Jewish Center for Immunology and Respiratory Medicine, to respondent;

C. On June 29, 1992, petitioner forwarded, pursuant to demand, a copy of Mr. Jones' calendar for the months of February and March of 1992.

[2]Following the false representations contained in respondent's footnote of January 4, 1993 contained in its answering brief, filed in the 6th Circuit, petitioner responded by filing material setting forth efforts made by petitioner to complete discovery and repudiating the misrepresentations made to the Courts by respondents:

**Proposed Exhibits**

October 8, 1992: Magistrate Pepe orders that "Plaintiff shall appear for his deposition on or before October 21, 1992, at a date, time and place to be set by defense counsel . . ." (Memorandum Opinion and Order by Magistrate Judge Steven D. Pepe)

October 12, 1992: Counsel for respondent wrote in her brief in support of motion for reconsideration of portion of October 8, 1992 order: "In conclusion, defendants and defense

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[2] On Page 17, Footnote 6 of their answer to petitioner's brief, respondent states: ". . . Defendants pointed out that not only had Jones not provided the discovery ordered on January 4, 1993, but also that all of the other discovery that had been mandated by the magistrate and district court had likewise never been provided by Jones." (PP 17, Footnote 6, of respondent's brief) This broad statement made by respondent was never supported by a specific description of those items which petitioner had failed to provide; nor did respondents trouble themselves with attempting to reveal to the Court what discovery material had been provided. This representation by respondents could have and would have come to light had petitioner's motions for discovery conferences been followed as mandated by FRCP 26(f).

counsel cannot proceed by October 21, for the reasons stated below. Further, defendants do not believe they should be required to proceed on such short notice given the pending motion to dismiss. Accordingly, defendants respectfully ask the court to hold that plaintiff's deposition does not have to be taken until November 30, 1992 or three weeks after Judge LaPlata rules on the motion to dismiss, whichever occurs later." (Motion by respondent for reconsideration of Magistrate's Order)

The proposed exhibits and facts set forth under the heading of proposed exhibits were rejected by the trial court and by the Sixth Circuit on the basis that they were not reflected in the District Court docket.

**Denial of Discovery to Petitioner**

On February 21, 1992, respondent in response to petitioner's sixth demand for production of records forwarded answers to petitioner which are a part of the record:

> "1. Copies of all records leading to any and all limitations on spending (Frees-Premiums, give-aways, or desk copies) by the company for the purpose of influencing the purchase of books by the various school entities, i.e., school boards, individual schools and school districts . . ."

Respondents' response to No. 1 was:

> "Defendant objects to this request to the extent it exceeds the 1986-1990 time period or to the extent it could be construed to include documents in hundred or thousands of individual personnel files on the grounds of relevancy, undue burden and expense. Defendants will produce any company-wide or regional directives, policies or guidelines as soon as they are compiled."

The answer was the same with reference to demands 2 and 3:

> "2. Copies of any and all guidelines and/or standards promulgated between 1986 and 1990, printed and distributed to the company's sales persons, supervisors

and consultants, whereby the expenses permitted for purpose of influencing or effecting a sale by representatives of the company to any school entity are limited.

"3. Copy of any documents setting forth what expenditures are permitted by the company to influence a sale for the years 1986 through 1990. (These limitations refer to 'Frees,' premiums, entertaining, gratuities and any and all other items distributed to sales personnel of any description to influence a sale.)"

Respondents' response to these demands was:

"2. See Response 1.

"3. See Response 1." Demands 4, 5, 6 and 7 produced equally evasive and misleading answers from an artful dodger:

"4. List of all persons authorizing such give aways plus their position in the company or region, specifically, the Midwest region.

"5. The names, addresses and territories assigned to each and every manager, sales representative and consultant assigned to the Midwest region between 1986 and 1990.

"6. A copy of the strategies and plans designed by authorized personnel in the company for effecting sales to specifically, Indiana, Detroit, Grand Rapids, Cleveland and Cincinnati.

"7. A copy of the strategies and plans designed by authorized personnel of the company for effecting sales to all major cities in the Midwest region.

Respondents' response to these demands were:

"4. This information will be provided to the extent possible.

"5. Defendants object to this request as it relates to the addresses of current employees, who can be contacted through defense counsel. The information will otherwise be provided.

"6. Defendants object to this request on the grounds of relevancy and the highly confidential nature of the business documents requested.

"7. See Response 6.

The keeping of the demanded records was ongoing and respondents had such records at their fingertips at all times. Copies of correspondence between company personnel and various school administrators were submitted or proposed to be submitted as proposed exhibits and as proof of the duplicity practiced by respondents relative to discovery procedures.

The conduct of respondents was violative of FRCP 34(a)(b) and was intended to mislead the courts and petitioner by any means possible, including lying, cheating and misrepresentation of facts.[3]

This case is one in which respondents have consistently and intentionally misrepresented the status of discovery proceedings and the degree of participation by petitioner in those proceedings; Respondents have also misrepresented the existence of documents epitomizing or demonstrating the standards and procedures utilized by respondents in effecting sales of their products, textbooks.

The misrepresentations and allegations made by the company through its agents have been accepted by the Court with a resulting denial of equal protection of the law and of due process to petitioner.

An examination of the case docket and the instruments filed by the parties divulges that without reason or justification, the district court has denied Petitioner the benefit of the provisions of FRCP 26 (and especially of the benefit of the provi-

[3] The country relative to the organization of Silver Burdett & Ginn was/is divided into East, West, Southern, Midwest, North Central, Southwest and Southeast Divisions/Regions, each of which had a manager (vice president) who had 3 or more district managers under him; each district manage was in charge of a number of sales representatives and consultants which number was determined by pupil enrollment in the district or region . . . The records requested by Plaintiff-Appellant encompassed only those related to or affecting the Midwest/North Central Region.

sions of FRCP 26(f), the benefit of the provisions of FRCP 34(a) and FRCP 34(b) and the benefit of the provisions of FRCP 37 — Failure to make or cooperate in discovery: Sanctions — in its entirety.

The case of *Hawkins* v *Town of Shaw, Mississippi* 461 F2d 1171 (1972) clearly states the positions which courts have taken in cases involving factual situations similar to the instant cause:

> "In judging human conduct, intent, motive and purpose are elusive subjective concepts, and their existence usually can be inferred only from proven facts. As stated in the original opinion, the record before us does not contain direct evidence which establishes bad faith, ill will or any evil motive on the part of the town of Shaw and its public officials. However, the record proof does clearly establish conduct which cannot e judicially approved.
>
> " . . . We feel that the law on this point is clear, for 'equal protection of the laws' means more than merely the absence of governmental action designed to discriminate; . . .' we now firmly recognize that the **arbitrary quality of thoughtlessness** can be as disastrous and unfair to private rights and to public interest as the perversity of a willful scheme.' (Emphasis supplied) *Norwalk CORE* v *Norwalk Redevelopment Agency*, 2 Cir. 1968, 395 F.2d 920, 931. See also *Kennedy Park Homes Association, Inc.* v *City of Lackawanna, New York*, (2 Cir. 1970) 436 F.2d 108, 114 cert. den. 401 U.S. 1010, 91 S.Ct. 1256, 28 L.Ed.2d 546 1971) and *United States ex rel Seals* v *Wiman*, 5 Cir. 1962, 304 F.2d 53 at 65.
>
> "Moreover, in our judgment the facts before us squarely and certainly support the reasonable and logical inference that there was here neglect involving clear overtones of racial discrimination in the administration of governmental affairs of the town of Shaw resulting in the same evils which characterize an inte ntional and

purposeful disregard of the principle of equal protection of the laws. See *Yick Wo* v *Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *Loving* v *Virginia*, 388 U.S. 1, 10, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1966); *Snowden* v *Hughes*, 321 U.S. 1, 8, 64 S.Ct. 397, 88 L.Ed. 497; *Kennedy Park Homes Association, Inc.* v *City of Lackawanna, supra*; *Rodriguez* v *Brown*, 5 Cir. 1970, 429 F.2d 269, 273; *Norwalk CORE* v *Norwalk Redevelopment Agency, supra* 395 F.2d at page 931."

On June 4, 1993, petitioner objected to two orders of the U.S. Court of Appeals for the Sixth Circuit:

A. Order Dismissing Appeal, Court of Appeals No. 92-2199, dated December 2, 1992, based on lack of jurisdiction;

B. Order Dismissing Appeal, Court of Appeals No. 93-1133, dated March 11, 1993, based on lack of jurisdiction;

by filing his Suggestion for Hearing of Appeal in Banc by the Court:

"Order Denying Petition for Writ of Prohibition and/or Writ of Mandamus, Court of Appeals No. 92-1237, dated March 24, 1992; Order Denying Petition for Rehearing and/or Reconsideration of Petition for Writ of Prohibition and/or Mandamus, Court of Appeals No. 92-1237, dated April 29, 1992;

The suggestion inclusive of Order Denying Petition for Writ of Prohibition and/or Writ of Mandamus, Court of Appeals No. 92–1237 dated March 24, 1992;

Order Denying Petition for Rehearing and/or Reconsideration of Petition for Writ of Prohibition and/or Mandamus, Court of Appeals No. 92–1237, dated April 29, 1992;

are contrary to the following decisions of the United States Court of Appeals for the Sixth Circuit and to the decisions of the United States Supreme Court and consideration by the full court is necessary to secure and maintain uniformity of decisions:"

*Humble* v *Mountain State Construction Company*, 441 F2d 816 (6th Cir 1971)

"Court will intervene only if there is abuse of discretion resulting in substantial prejudice."

*Burns* v *Thiokol Chemical Corp*, 483 F2d 300 (5th Cir 1973)

*Blue Bell Boots, Inc.*v *EEOC*, 418 F2d 355, 358 (6th Cir 1969)

*EEOC* v *Roadway*, 9 752 F2d 40 (6th Cir 1984)

"General employment practices are relevant to disparate treatment claim."

*Schlagenhauf* v *Holder*, 379 US 104, 111; 85 S Ct 234

Mandamus and Final Judgment Rule

*Colonial Times* v *Gasch*, 500 F2d 517

*Martin* v *Chrysler Corp*, 107 FEP 329 (E.D. Mich 1974)

*Long* v *Ford Motor Co*, 496 F2d 500, (6th Cir 1974)

*Alexander* v *Gardner-Denver Co*, 415 US 36, 94 S Ct 1011 (1974)

*Ghandi* v *Police Dept City of Detroit*, 747 F2d 338 (6th Cir 1984)

"Court will intervene only if there is abuse of discretion resulting in substantial prejudice."

The dismissal of Plaintiff-Appellant's complaint is the result of a well conceived but fallicious plan, designed for the purpose of depriving him, Plaintiff-Appellant, of his day in court. Misconstruction of facts and labeling of orders in order to achieve a desired result, dismissal of Plaintiff-Appellant's complaint, were effectively utilized for the sole purpose of justifying dismissal of Plaintiff-Appellant's complaint.

Defendant-Appellees' motions to dismiss, in which the actions and positions of the parties were totally misrepresented to the court, are reflected in letters forward to counsel for Plaintiff-Appellant and the Court by counsel for Defendant-Appellees.

The Court either naively or intentionally bought the representations or intentionally participated in order to justify dismissal. For some reason unknown to counsel for Plaintiff-Appellant, the misrepresentations of fact and law were accepted by both the Magistrate and Judge.

The deposition was not rescheduled. The case was dismissed and the basis for dismissal given by the Honorable George LaPlata was: "failure to cooperate in discovery." (Order Granting Motion to Dismiss)

From that date through the present date, petitioner had not only attempted to cooperate fully in effectively completing discovery through the mail, he had taken four depositions of potential defense witnesses while accommodating counsel for respondents' schedule.

The discovery requests, motions to compel and objections filed by Petitioner were uniformly objected to by respondents Magistrate Pepe and Judge LaPlata also rejected petitioner's position. These actions led to the filing of an affidavit by petitioner, a motion to recuse being filed in the District Court in his behalf, to an application for writ of prohibition and mandamus being filed in the U.S. Court of Appeals.

The order which best exemplifies an abuse of discretion is the order regarding the eight motions entered by Magistrate Pepe on October 31, 1991 and affirmed by Judge LaPlata on January 22, 1992.

The issue of disparate treatment was never approached by respondents in their discovery efforts. All of their efforts were centered upon establishing that petitioner, acting alone and devoid of contact with his supervisors, had falsified his expense accounts and abused his expense account privileges.

In efforts to establish the nature of petitioner's employment and the theory of his case, the depositions of four (4) persons possessing expertise in the book business were taken . . . and forwarded to the court in support of petitioner's position. (Notice of Taking Deposition of Dr. Norman McRae; Notice of Taking Deposition of Jack Ripstra; Notice of Taking Deposition of Rev.

Wendall Anthony; Re-Notice of Taking Deposition of Alonzo Bates). However, all four were rejected and forwarded back to counsel's office without being examined or read.

The culmination of the case revolves around the last two orders issued by the Hon. George LaPlata: On **January 4, 1993**, Judge LaPlata issued an order affirming order of October 9, 1992; denying defendants' motion to dismiss and ordering plaintiff to provide discovery.

The order further stated that "Furthermore, it is ordered that plaintiff shall appear at a mutually convenient date and time, no later than January 29, 1993. In addition, to the extent that plaintiff has not yet provided the following discovery,

Plaintiff is ordered to:

(1) Provide all existing 1982 and 1990 state, federal and local tax returns to defense counsel no later than January 13, 1993, and

(2) Answer defendants' request for admission No. 1 and No. 2 no later than January 13, 1993, or they will be deemed to have been admitted. Failure to provide the above-ordered discovery will result is dismissal of the case."

On **February 26, 1993**, Judge LaPlata issued an order granting defendants' motion to dismiss and dismissing plaintiff's complaint.

Some of the unfinished business still before the Court on January 9, 1993 was:

(1) On **January 5, 1993**, the U. S. Court of Appeals granted a motion to dismiss petitioner's appeal and denied his motion for stay as moot;

(2) On **January 19, 1993** respondents filed their motion for clarification of order of January 4, 1993;

(3) On **January 20, 1993**, the Hon. George LaPlata set "deadline for response to motion for clarification of order of 1/4/93 by Silver Burdett & Ginn, Simon and Schuster Inc. [173.1] set for 2/5/93, and reply to response set for 2/1/93;"

(4) On **January 21, 1993**, the Hon. George LaPlata caused an order "denying motion for clarification of order of 1/4/93 . . ."

(5) On **January 22, 1993** for "deadline for response to motion to dismiss by Silver Burdett & Ginn, Simon & Schuster, Inc., set for 1/29/93, deadline for reply set for 2/3/93 (1168)."

(6) On **February 17, 1993**, respondents filed a motion to dismiss petitioner's appeal for lack of jurisdiction;

(7) On **February 26, 1993**, the Hon. George LaPlata granted respondents' motion to dismiss and dismissed petitioner's complaint;

(8) On **March 3, 1993**, petitioner filed his notice of appeal plus docketing and filing fees.

(9) On **March 15, 1993** petitioner filed his motion for consolidation of appeals;

Although the Court of Appeals for the Sixth Circuit chose not to grant petitioner's petition for writ of mandamus and/or a writ of prohibition, this does not impinge upon the facts or law as set forth herein; neither does it impinge upon the ability of the plaintiff to establish that there has clearly been a usurpation of power, abuse of discretion and denial of equal protection of the laws by the U.S. District Court in the instant cause.

The rulings of the court in the subject case to the extent that it has failed to fairly and impartially interpret FRCP 26, 34(a) and (b) and FRCP 37, have constituted definite prejudicial interferences adverse to petitioner.

Furthermore, the harsh remedy of dismissal for failure to comply with pretrial discovery order should only be used when failure to comply is due to wilfulness, bad faith, or fault of party. *Edgar* v *Slaughter*, 548 F2d (9th Cir 1977)

Here, the Court in *Edgar*, *supra*, cited the observation made by Judge Van Oosterhout in *Fox* v *Studebaker-Worthington, Inc*, 516 F2d 989, 996 (8th cir 1975) when he stated:

> "[t]here is a strong policy favoring a trial on the merits and against depriving a party of his day in court."

In this same context, the Court in *United States* v *Sumitomo Marine & Fire Insurance Co*, 617 F2d 1365, 1369 (6th Cir 1980) made the very point stressed in this appeal:

> "A district court's use of sanctions in order to achieve these objectives is tempered by the requirements of due process. For example, 'when it has been established that failure to comply [with court discovery orders] has been due to inability, and not to wilfulness, bad faith, or any fault of [the disobedient party]', the harshest sanction of dismissal is improper. *Societe International Pour Participations Industielles et Commerciales* v *Rogers*, 357 US 197, 212, 78 S Ct 1087, 1096, 2 L.Ed.2d 1255 (1958)."

## REASONS FOR GRANTING THE WRIT

The judgment of the United States Court of Appeals for the Sixth Circuit should be reviewed by this Court because its decision is fully supportive of the position taken by the District Court;

That position invalidates FRCP 26, et seq. at the sole discretion of the trial judge, if he is permitted within his sole discretion to decide in which instance the procedural rules will be enforced and if he is permitted such wide latitude that he is able to in effect become an advocate for one of the parties to the litigation being tried before him and deny one of the litigants due process of law and equal protection of the law.

Petitioner has suffered the loss of both of these most important constitutional guaranties:

The United States Supreme Court has said that the discovery rules are to be broadly and liberally construed, *Hickman* v *Taylor*, 329 US 495, 507; 67 S Ct 385; 91 LED 451 (1947); *Schlagenhauf* v *Holder*, 379 US 104, 1140-115; 85 S Ct 234; 13 LEd2d 152 (1964). This is especially true in Title VII cases, where statistical data, obtainable mainly through discovery often plays a crucial role at trial. *Burns* v *Thiokol Chemical Corp.*,

483 F2d 300, 305 (5th Cir 1973). In *Burns*, supra, it was held that an individual plaintiff suing for himself or on behalf of a class, has the same right of access to an employer's information as the EEOC has when conducting an investigation into claimed discrimination. 483 F2d at 305. The investigatory powers of EEOC are broad indeed. See e.g., *Graniteville Co.* v *EEOC*, 438 F2d 32, 39-41 (4th Cir 1971). Discovery in a Title VII action is not limited to plaintiff's department or division of employment, but may be company-wide in scope. *Blue Bell Boots, Inc.* v *EEOC*, 418 F2d 355, 358 (6th Cir 1969); *Graniteville Co.*, supra at 42.

Among the Advisory Committee notes to the rules of civil procedure for the United States District Courts, Under Rule 1: Scope and Purpose of Rules, (Note to 1993 Amendment), the most cogent note states:

> "The purpose of this revision adding the words 'and administered' to the second sentence is to recognize the affirmative duty of the Court to exercise the authority conferred by the rules to insure that civil litigation is resolved not only fairly, but also without undue costs or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned."

The failure of the trial judge in the instant cause, of the respondent and of the Sixth Circuit Court of Appeals to recognize and abide by the scope and purpose of the rules has resulted in petitioner's:

1. Appealing from denial of his motion for relief from certain pretrial orders: The order denying this appeal is dated December 2, 1992 and is signed by Leonard Green, Clerk;

2. Filing a petition for a writ of prohibition or mandamus — seeking to have the Court of Appeals for the Sixth Circuit review and reverse certain pretrial discovery orders entered in this action alleging disparate treatment in violation of Title VII of the 1964 Civil Rights Act, 42 USC Section 2000(e) et seq;

3. Appealing an order of the United States District Court "affirming a discovery order of the magistrate judge and order-

ing a stay of that order pending appeal; again the order of denial was signed by Leonard Green, Clerk, on March 11, 1993;

4. Appealing the order of the District Court dismissing, pursuant to FRCP 37 his civil rights action.

There was not one word emanating from the District Court or the Sixth Circuit Court of Appeals relative to the scope and purpose of FRCP 26 or abuse of discretion, whichis one of the focal points of petitioner's supplication to the Court of Appeals.

The several decisions by Mr. Leonard Green zero in on lack of jurisdiction in the Court of Appeals to non-final discovery orders; the panel of Martin, Ryan and Suhrheinrich referred to the orders appealed from as discretionary, non-final orders.

The panel also ignored or refused to consider whether respondents had been or were in violation of FRCP 26 et seq.; at any rate, the results were the same, denial of due process and equal protection of the law to petitioner.

An examination of the record, including every order and opinion of both the magistrate and judge, establishes that both failed to contemplate or recognize the obligations placed upon them by FRCP 26(f), or 26(g) and FRCP 37.

While mere error, even gross error in a particular case, as distinguished from a calculated and repeated disregard of governing rules, does not suffice to support issuance of (a) the Writ, *United States* v *Distafano*, 462 F2d 845, 850 (2nd Cir, 1972); "IBM's (Respondent's) burden, therefore, is not necessarily to demonstrate that the issue of . . . applicability (of a rule or statute) is frivolous and not substantiated, but to establish that in its course of considering the issue, (the) judge has usurped power and clearly abused his discretion.

While the district court's serious consideration of a non-frivolous issue is normally appropriate, the nature of the question, the posture of the case in which it is considered, and the practical consequences of a lengthy consideration may lead to the conclusion."

While counsel for petitioner is reluctant to categorically state that the instant case is one of first impression, in all of his years in the practice of law, this is the first instance in which he has faced the problem created by the absolute failure of the court to adhere to the rules and in which he has effectively been denied discovery in a disparate treatment case while, at the same time, the opponents have been granted their every wish, relevant or not.

Petitioner therefore believes that this is a case of first impression and a clear abuse of discretion, especially since his right to plan and proceed with his case in a normal manner has been critically wounded by the decisions of the district court to the extent that he has been completely deprived of his theory of the case.

In addition to the several other actions of the district court which constitute usurpation of power, the ordering of the defendants by the court to produce 100 randomly selected expense reports rather than those requested by plaintiff and that part of the order barring plaintiff from producing Ann Marie Smith as a witness for any purpose each clearly constitute usurpation of power by the district judge.

There can be little doubt but that the instant case presents exceptional circumstances and that it is of extraordinary significance; further, the repeated ignoring of the governing rules by the magistrate judge and the district judge are nothing less than calculated and serve to distinguish this case and its facts from one involving mere error or even gross error.

In addition, the potential for the amount of time to be spent in the taking of discovery combined with the potential expenses involved ($500 for a copy of each day's proceedings) and the defendants' penchant for scheduling witnesses for two days' deposition testimony each give this case extraordinary significance in terms of due process and equal protection of the laws. The scales of justice are effectively tipped by the superior assets of the corporate defendants.

In Hawkins v Town of Shaw, Mississippi, 461 F.2d 1171 (1972), the Court laid the groundwork for its decisions relating to "equal protection of the law," supra.

And, the Court makes a cogent statement relative to the judicial responsibility of the Courts:

> "The doctrine of 'ripeness' is a component of the 'cases' and 'controversies' requirement of Article III, Section 2 and is essentially a problem of pre-maturity. The Supreme Court has said:
>
> > "'The power of courts, and ultimately of this Court to pass upon the constitutionality of acts "'Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough . . . It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other."' Hawkins, supra.

In *People* v *Jacobs*, 23 Cal, App 3d 246, the Court expresses the constitutional factors involved in denial of equal protection of the laws: "We apprehend the constitutional guarantee of equal protection of the laws to mean that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty, and property and in their pursuit of happiness. (See *Traux* v *Corrigan*, 257 U.S. 312, 336-338, 42 S.Ct. 124, 66 L.Ed. 254; *Kentucky Finance Corp* v *Paramount Exch.*, 262 U.S. 544, 550, 43 S.Ct. 636, 67 L.Ed. 1112; *Gray* v *Whitmore*, 17 Cal.App 3d 1, 21, 94 Cal.Rptr. 904.) 'The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.' (*Purdy & Fitpatrick* v *State of California*, 71 Cal.2d 566, 578, 79 Cal.Rptr. 77, 85, 456 P.2d 645, 653.) As we observed in *Gray*, 'This concept does not, however, require absolute

equality [citations] or that a statute necessarily apply equally to all persons [citations]; rather, it permits a state to provide for differences so long as the result does not amount to an invidious discrimination. [Citations].' (17 Cal.App.3d at 21–22, 94

Cal.Rptr. at p. 915.)"

Although the Court of Appeals for the Sixth Circuit chose not to grant plaintiff's petition for writ of mandamus and/or a writ of prohibition, this does not impinge upon the facts or law as set forth herein; neither does it impinge upon the ability of the plaintiff to establish that there has clearly been a usurpation of power, abuse of discretion and denial of equal protection of the laws by the U.S. District Court in the instant cause.

The rulings of the court in the subject case to the extent that it has failed to fairly and impartially interpret FRCP 26, 34(a) and (b) and FRCP 37, have constituted definite prejudicial interferences adverse to Plaintiff-Appellant.

Furthermore, the harsh remedy of dismissal for failure to comply with pretrial discovery order should only be used when failure to comply is due to wilfulness, bad faith, or fault of party. *Edgar* v *Slaughter*, 548 F2d (9th Cir 1977)

Here, the Court in *Edgar*, *supra*, cited the observation made by Judge Van Oosterhout in *Fox* v *Studebaker-Worthington, Inc*, 516 F2d 989, 996 (8th cir 1975) when he stated:

> "[t]here is a strong policy favoring a trial on the merits and against depriving a party of his day in court."

In this same context, the Court in *United States* v *Sumitomo Marine & Fire Insurance Co*, 617 F2d 1365, 1369 (6th Cir 1980) made the very point stressed in this appeal:

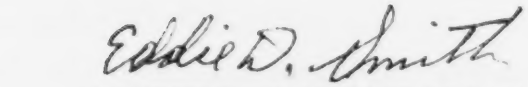
> "A district court's use of sanctions in order to achieve these objectives is tempered by the requirements of due process. For example, 'when it has been established that failure to comply [with court discovery orders] has been due to inability, and not to wilfulness, bad faith, or any fault of [the disobedient party]', the harshest sanction of dismissal is improper. *Societe*

*International Pour Participations Industielles et Commerciales* v *Rogers*, 357 US 197, 212, 78 S Ct 1087, 1096, 2 L.Ed.2d 1255 (1958)."

## CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,
LAW OFFICES OF EDDIE D. SMITH



EDDIE D. SMITH (P 20645)
One Kennedy Square — Suite 500
Detroit, Michigan 48226
(313) 963-6271
*Attorney for Petitioner*

Dated: June 13, 1994

**APPENDIX A**

*NOT RECOMMENDED FOR FULL TEXT PUBLICATION*
*See, Sixth Circuit Rule 24*

**FILED**
**MARCH 17, 1994**

**NO. 93-1381**

# UNITED STATES COURT OF APPEALS

**For the Sixth Circuit**

GEORGE JONES,
*Plaintiff-Appellant,*

v.

SIMON & SCHUSTER, INC., a New Jersey corporation, and SILVER BURDETT & GINN a New Jersey corporation
*Defendants-Appellees.*

ON APPEAL from the United States District Court for the Eastern District of Michigan

BEFORE: MARTIN, RYAN and SUHRHEINRICH, Circuit Judges.

PER CURIAM. George Jones appeals the order of the district court dismissing, pursuant to Federal Rule of Civil Procedure 37, his civil rights action. For the following reasons, we affirm the district court's judgement.

George Jones was discharged from his position as a textbook salesman in the Detroit, Michigan office of Silver, Burdett & Ginn, a wholly-owned subsidiary of Simon & Schuster, Inc., on December 12, 1989. On March 23, 1991, Jones initiated this action, raising racially motivated termination, retaliatory discharge, slander, and libel claims. Shortly thereafter, the defendants began a two-year struggle to obtain discovery from Jones.

The district court initially set November 26 as the discovery deadline. In July, Jones, on the advice of his counsel, refused to answer certain questions during his deposition. Over the next few months, Jones also refused to answer defendants' request

for admissions, failed to respond fully to defendants' interrogatories and document requests, and moved moved to block resumption of his deposition. The defendants, in turn, applied for an order compelling discovery pursuant to Rule 37.

On October 31, the magistrate judge interceded to break the discovery deadlock. In an order resolving all pending discovery motions, the magistrate judge directed Jones to complete his deposition, answer the disputed questions, respond to defendants' request for admission, and provide most of the requested documents and interrogatory answers. Because he found that Jones' failure to comply with the disputed discovery obligations was not substantially justified within the meaning of Rule 37(a)(4), the magistrate judge also ordered Jones' counsel to pay the expenses incurred by the defendants in obtaining the order to compel.[1]

Over the next fifteen months, the discovery period was repeatedly extended as Jones failed to comply with several pretrial orders. In November 1991, Jones canceled the continuation of his deposition at the last minute, claiming that he was unavailable to testify. After the magistrate judge granted defendants' motion to compel Jones' testimony and assessed costs of $1,281.94 against Jones' counsel, the deposition was rescheduled for March 4, 1992. On March 3, Jones' counsel notified the defendants that Jones would be unable to attend the deposition the following day. For a third time, the defendants moved to compel Jones' testimony. Simultaneously, the defendants filed a separate motion to dismiss the complaint pursuant to Rule 37 for failure to comply with the court's discovery orders.

In an effort to put the case back on track once again, the magistrate judge held evidentiary hearings on April 22 and June 25 regarding Jones' failure to appear for his deposition. After both Jones and his counsel testified that they had received

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[1]During the same period, the magistrate judge awarded defense counsel $300.00 in expenses because Jones' counsel violated Federal Rules of Civil Procedure 11 and 12(e) and Local Rule 17 by filing a motion for a more definite statement in response to the defendants' answers.

notice of the March 4 deposition but did not take any steps to reschedule the proceeding until March 3, the magistrate judge concluded that Jones' failure to appear resulted from "gross negligence and indifference on the part of plaintiff and his counsel." Joint Appendix at 329. Accordingly, by an order dated October 9, the magistrate judge assessed costs of $1,170.00 against Jones and his counsel under Rule 37(d) for their unexcused noncompliance, and directed Jones to appear for his deposition within two weeks. Despite the magistrate judge's warning that continued failure to comply could result in dismissal of his claim, Jones never testified or produced the previously ordered materials.

Instead, Jones filed yet another objection to the magistrate judge's rulings,[2] and moved to disqualify both the magistrate judge and the district judge from hearing further proceedings in the case. On December 21, the district court denied Jones' motion to disqualify, finding that the alleged bias arose only from judicial conduct compelled by the court's view of the law. Shortly thereafter, the district court gave Jones a final chance to comply with the court's discovery orders.

In a comprehensive order dated January 4, 1993, the district court denied defendants' Rule 37 motion to dismiss, and affirmed the magistrate judge's October 9, 1992, discovery order. While the court concluded that "there can be little doubt that the defendants have been prejudiced by the inability to complete discovery and that the less drastic sanctions imposed have not been effective," the district court declined to dismiss Jones' complaint because it was "not satisfied that plaintiff had rea-

[2] During 1992, Jones filed multiple objections to the magistrate judge's discovery orders. In a separate motion, Jones also sought to have the discovery orders set aside.The district court, in turn, affirmed each of the magistrate's orders and denied Jones' motion for relief. Unsatisfied with these rulings, Jones first petitioned this Court for a writ of mandamus and then appealed the denial of his motion for relief. As discovery orders are discretionary, non-final orders, panels of this Court dismissed both appeals. *See Jones v. Simon & Schuster, Inc.*, No. 92-1237 (6th Cir. March 24, 1992); *Jones v. Simon & Schuster, Inc.*, No. 92-2199 (6th Cir. Dec. 2, 1992).

sonable notice in March 1992 that failure to appear at the deposition could result in dismissal of his case." J.A. at 342. Rather, the district court directed Jones to appear for his continued deposition no later than January 29, and ordered Jones to provide certain documents and answer the outstanding request for admission no later than January 13. The order expressly warned Jones that failure to comply with these dictates would result in dismissal of his case.

Jones apparently chose to disregard this warning. When Jones failed to provide the ordered discovery by January 13, the defendants filed a second motion to dismiss the complaint. Although Jones responded to the motion to dismiss, at no time did he indicate that he would produce the requested documents or appear for his deposition. Instead, Jones attempted to derail discovery yet again by filing a third notice of appeal, seeking review of the district court's non-final discovery order of January 4. On February 26, the district court concluded that sanctions under Rule 37(b) were warranted and dismissed Jones's complaint. This timely appeal followed.

Upon review, we find no error in the district court's dismissal of Jones' claim. When a party fails to obey a discovery order, Rule 37(b) permits a court to enter an order "dismissing the action or proceeding or any part thereof." FED. R. CIV. P. 37(b)(2)(C). Such orders are reviewable only for abuse of discretion. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976).

As the district court acknowledged, the dismissal of an action "is a sanction of last resort." *Regional Refuse Systems, Inc. v. Inland Reclamation Co.*, 842 F.2d 150, 153 (6th Cir. 1988). Where, however, "a party has the ability to comply with a discovery order and does not, dismissal is not an abuse of discretion." *Id.* at 154. In reviewing Rule 37(b) dismissals, this Court generally considers "whether the adversary was prejudiced by the dismissed party's failure to cooperate in discovery; whether the dismissed party was warned that failure to cooperate could lead to dismissal; and whether less drastic

sanctions were imposed or considered before dismissal was ordered." *Id.* at 155 (citations omitted).

Here, the record clearly reveals that both Jones and his counsel cavalierly refused to comply with the district court's discovery orders for almost two years. Throughout this period, the defendants, who were entitled to timely adjudication of the dispute, battled to procure Jones' attendance at his own deposition and to obtain basic discovery. After the repeated imposition of financial sanctions proved unavailing, the court explicitly placed Jones on notice that continued noncompliance would lead to dismissal of his action. Despite these warnings, Jones failed to take advantage of the January 1993 reprieve offered by the court and disobeyed its final discovery order. Under these circumstances, we cannot conclude that dismissal under Rule 37 was an abuse of discretion.

For the foregoing reasons, the judgment of the district court is affirmed.

FILED
MARCH 11, 1993

No. 93-1133

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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| GEORGE JONES,<br>*Plaintiff-Appellant,*<br><br>v.<br><br>SIMON & SCHUSTER, INCORPORATED, a New Jersey corporation; SILVER BURDETT & GINN a New Jersey corporation; AMRLY P. WARD; MARK J. LAWLESS,<br>*Defendants-Appellees.* | ORDER |

*NOT RECOMMENDED FOR
FULL TEXT PUBLICATION*

BEFORE: BOGGS and BATCHELDER, Circuit Judges; and MANOS, Senior District Judge.*

Plaintiff appeals the January 4, 1993, order of the district court affirming a discovery order of the magistrate judge and directing plaintiff to submit to discovery. Plaintiff now seeks a stay of that order pending appeal. Defendants oppose the motion for a stay and move to dismiss the appeal for lack of jurisdiction.

The order which plaintiff seeks to have this court review is a non-final, non-appealable discovery order. Therefore, this court is without jurisdiction in this matter. *See Federal Deposit*

* The Honorable John M. Manos, U.S. Senior District Judge for the Northern District of Ohio, sitting by designation.

*Insurance Corp. v. Ernst & Whinney*, 921 F.2d 83, 85 (6th Cir. 1990); *Dow Chemical Co. v. Taylor*, 519 F.2d 352 (6th Cir.), *cert. denied*, 423 U.S. 1033 (1975). The court notes that this is the third time plaintiff has been before the court seeking review of non-final orders. This court has jurisdiction of appeals from final judgments of the district courts. 28 U.S.C § 1291. Plaintiff is cautioned to consider carefully whether appellate jurisdiction exists prior to filing another notice of appeal in this action.

It therefore is **ORDERED** that the motion to dismiss for lack of jurisdiction is granted and the motion for a stay pending appeal is denied as moot. No sanctions are awarded at this time.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN

Leonard Green
Clerk

FILED
DECEMBER 2, 1992

No. 92-2199

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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| GEORGE JONES, *Plaintiff-Appellant*, v. SIMON & SCHUSTER, INC., a New Jersey corporation; SILVER BURDETT & GINN a New Jersey corporation; AMRYL P. WARD; MARK J. LAWLESS, *Defendants-Appellees*. | ) | ORDER |

BEFORE: MILBURN and BATCHELDER, Circuit Judges; and CONNIE, Senior Circuit Judge.

Plaintiff appeals the denial of his motion for relief from certain pretrial orders. He now seeks a stay pending appeal. Defendants oppose the motion for a stay and move to dismiss the appeal for lack of jurisdiction. In addition, defendants seek an award of costs, including attorney's fees.

Upon review, we conclude that we lack jurisdiction of this appeal. The orders that plaintiff seeks to have the court review are essentially discovery orders. It is well established in this circuit that discovery orders are non-final, non-appealable orders. *See Federal Deposit Insurance Corp. v. Ernst & Whinney*, 921 F.2d 83, 85 (6th Cir. 1990); *United States v. James T Barnes & Co.*, 758 F.2d 146 (6th Cir. 1985) (order); *Butcher v. Bailey*, 753 F.2d 465, 471 (6th Cir. 1985); *Dow Chemical Co. v. Taylor*, 519 F.2d 352 (6th Cir.), *cert. denied*, 423 U.S. 1033 (1975).

It therefore is **ORDERED** that the motion to dismiss is granted and the motion for a stay pending appeal is denied as moot. No costs are awarded.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green
Clerk

FILED
MARCH 24, 1992

No. 92-1237

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

| | | |
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| In re: GEORGE JONES, | ) | |
| *Petitioner.* | ) | ORDER |
| | ) | |

BEORE: GUY and NELSON, Circuit Judges; and REAVLEY, Senior Circuit Judge.*

Petitioner filed a petition for a writ of prohibition or mandamus seeking to have this court review and reverse certain pretrial discovery orders entered in this action alleging disparate treatment in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, *et seg.* In addition, petitioner seeks to have this court prohibit Judge La Plata and Magistrate Judge Pepe from further involvement in this case.

The remedies of mandamus and prohibition are drastic ones, to be invoked only in extraordinary situations where the petitioner can show a clear and indisputable right to the relief sought. *See Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 661–62 (1978); *Kerr v. United States District Court*, 426 U.S. 394, 402–03 (1976). A writ of mandamus should not be used to control a district court in the exercise of discretionary duties. *In re Post-Newsweek Stations*, 722 F.2d 325, 329 (6th Cir. 1983); *City of Cleveland v. Krupansky*, 619 F.2d 576, 578 (6th Cir.) (per curiam), *cert. denied*, 449 U.S. 834 (1980). Pretrial discovery orders, therefore, generally are not reviewable in mandamus. *See Will v. United States*, 389 U.S. 90 (1976) (criminal case); *Warden, Kentucky State Penitentiary v. Gall*, 865 F.2d 786 (6th Cir. 1989); *City of Cleveland v. Krupansky*, 619 F.2d 572, 575 (6th Cir.) (per curium), *cert. denied*, 449 U.S. 834 (1980).

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*The Honorable Thomas M. Reavley, Senior Circuit Judge for the Fifth Circuit U.S. Court of Appeals, sitting by designation.

Petitioner has not demonstrated that this is an exceptional case that would warrant the issuance of either a writ of prohibition or a writ of mandamus. The pretrial discovery orders were within the discretion of the district court and may be reviewable upon appeal from the entry of a final judgment in this action. *See, e.g., Mellon v. Cooper-Jarrett, Inc.*, 424 F.2d 499, 501 (6th Cir. 1970) (per curiam). Moreover, petitioner has not demonstrated a clear and indisputable right to the relief he requests.

It therefore is **ORDERED** that the petition for a writ of prohibition or mandamus is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN

Leonard Green
Clerk

B-1

*Jones v. Simon & Schuster, Incorporated, et. al.*

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

GEORGE JONES,
*Plaintiff,*

v.

SIMON & SCHUSTER, INCORPORATED, et. al.,
*Defendants.*

C.A. No.
91-CV-60089-AA

HON. GEORGE La PLATA

**ORDER DENYING PLAINTIFF'S MOTION TO SUPPLEMENT RECORD ON APPEAL**

On March 8, 1993, plaintiff George Jones filed a notice of appeal from this Court's February 26, 1993 Order dismissing plaintiff's Complaint. On July 15, 1993, plaintiff filed a motion to supplement the record on appeal pursuant to Fed. R. App. P. 10(e). Defendants have filed a response opposing the requested relief for several reasons.

Rule 10(e) provides that "[i]f anything material to either party is omitted from the record by error or accident or is misstated therein" the district court may direct that the omission be corrected, and if necessary that a supplemental record be certified and transmitted. However, this rule is not intended to permit the addition of records which were not before the district court. *S & E Shipping Corp.* v. *Cheasapeake & Ohio Railway Co.*, 678 F.2d 636, 641 (6th Cir. 1982).

In this case plaintiff admits that the documents he seeks to add to the record were never brought to the attention of this Court (Motion, p. 6). Therefore, plaintiff's motion to supplement the record is DENIED.

/s/ GEORGE LA PLATA

George La Plata
U.S. District Judge

August 25, 1993
Ann Arbor, MI

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

GEORGE JONES,
*Plaintiff,*

v.

SIMON & SCHUSTER, INCORPORATED, et. al.,
*Defendants.*

C.A. No.
91-CV-60089-AA

HON. GEORGE La PLATA

## ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND DISMISSING PLAINTIFF'S COMPLAINT

In this Court's Order of January 4, 1993, plaintiff George Jones was ordered to provide certain discovery by January 13, 1993, and appear to complete his deposition no later than January 29, 1993, or the case would be dismissed. (See Order Affirming Order of October 9, 1992; Denying Defendants' Motion to Dismiss and Ordering Plaintiff to provide Discovery). On January 21, 1993, defendants filed a motion to dismiss the complaint because plaintiff failed to provide the ordered discovery by January 13, 1993.

Plaintiff filed responses to this motion on January 25 and 29, 1993. Plaintiff does not deny that he has not provided the ordered discovery and does not represent that it will be produced or that he will appear for deposition. Instead, on January 20, 1993, plaintiff filed a Notice of Appeal from this Court's January 4, 1993 Order. It is apparent that this is merely an attempt to further delay progress in this case.

The Notice of Appeal states that "[p]laintiff appeals only from that part of the order affirming order of October 9, 1992 and ordering or directing that plaintiff provide discovery to

defendant." However, plaintiff is on notice that this is not a proper appeal. In a Mandate issued December 28, 1992, the Sixth Circuit dismissed plaintiff's previous appeal from an order entered in this case. The Sixth Circuit dismissed plaintiff's appeal and denied his request for stay pending appeal, stating as follows:

> "Upon review, we conclude that we lack jurisdiction of this appeal. The orders that plaintiff seeks to have the court review are essentially discovery orders. It is well established in this circuit that discovery orders are non-final, non-appealable orders."
> (citations omitted).

Plaintiff's appeal from the January 4, 1993 Order is likewise taken from a non-final, non-appealable order. While a proper notice of appeal generally divests the district court of jurisdiction, the Sixth Circuit has held that a notice of appeal from a plainly non-appealable order may be ignored by the district court. *Cochran* v. *Birkel*, 651 F.2d 1219, 1222 (6th Cir. 1981), *cert den.* 454 U.S. 1152 (1982).

The factors to be considered in deciding whether to dismiss an action for failure to cooperate in discovery are set forth in *Regional Refuse Systems* v. *Inland Reclamation Co.*, 842 F.2d 150 (6th Cir. 1988). These factors were discussed in this Court's January 4, 1993 Order, which specifically advised that failure to cooperate in discovery would result in dismissal. While dismissal under Fed. R. Civ. P. 37(b) is a sanction of last resort, it is an appropriate sanction in this case, at this juncture. Therefore, defendants motion is GRANTED and the complaint is DISMISSED.

/s/ GEORGE LA PLATA

George La Plata
U.S. District Judge

February 26, 1993
Ann Arbor, MI

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

GEORGE JONES,
*Plaintiff,*

v.

SIMON & SCHUSTER, INCORPORATED, et. al.,
*Defendants.*

C.A. No.
91-CV-60089-AA

HON. GEORGE La PLATA

## ORDER AFFIRMING ORDER OF OCTOBER 9, 1992; DENYING DEFENDANTS' MOTION TO DISMISS AND ORDERING PLAINTIFF TO PROVIDE DISCOVERY

Having considered and denied plaintiff's motion to disqualify brought under 28 U.S.C. §144, the Court may now turn to the remaining pending matters in this case. After plaintiff failed to appear at his continued deposition in March 1992, defendants filed their third motion to compel plaintiffs deposition and a separate motion to dismiss the complaint for failure to comply with the Court's discovery orders. These are the motions at issue.

## APPEAL FROM ORDER GRANTING DEFENDANTS' MOTION TO COMPEL AND FOR SANCTIONS

The motion to compel was referred to Magistrate Judge Steven Pepe and a hearing was held on April 22, 1992. Concluding that defendant was entitled to complete plaintiff's deposition, the hearing was continued to allow further factual inquiry into the circumstances surrounding plaintiff's failure to appear for deposition in March 1992. Specific factual findings and conclusions are found in the seven-page Memorandum Opinion and Order filed on October 9, 1992. That Order granted the motion to compel; ordered plaintiff to appear for deposition before October 21, 1992; and imposed sanctions of $1,170.00 against plaintiff and his counsel, jointly. Plaintiff filed objections to the Order and defendants sought reconsideration of the short time frame provided for taking the deposition.

As this Court has noted in several previous orders, where the Magistrate's Order addresses only non-dispositive matters, this Court must consider the specific objections raised and modify or set aside any portion of the Order which it finds to be clearly erroneous or contrary to law. L.R. 72.1(d), Fed. R. Civ. P. 72(a).

First, plaintiff states that there are many factual inaccuracies in the Order, but fails to identify any specific instance. Next, plaintiff expresses concern that certain language in the Order may violate the limitation that only a district judge may enter an order disposing of a case. Specifically, the Order states as follows:

> "NOTICE: If plaintiff fails to appear for his deposition at the time and place set pursuant to this supplementary order, his claim against the defendant may be dismissed with prejudice,. . ."

Plaintiff is correct that Magistrate Pepe does not have authority to enter an order of dismissal. However, this warning is merely notice to plaintiff that the case could be dismissed under Fed. R. Civ. P. 37(d), if he fails to comply with the Court's discovery orders. The supplementary order setting a date for the deposition was not entered due to plaintiff's motion to disqualify.

Thus, plaintiff has not shown that any portion of the October 9, 1992, Memorandum Opinion and Order is clearly erroneous or contrary to law and, therefore, it is AFFIRMED.

## MOTION TO DISMISS UNDER RULE 37(d)

Defendants filed a motion to dismiss the complaint pursuant to Fed. R. Civ. P. 37(d), on the grounds that plaintiff has blatantly and willfully refused to comply with the discovery orders entered in this case. Defendants contend that plaintiff has failed to comply with the October 31, 1991 "Order Regarding Eight Motions" and "Order Granting in Part Defendants' Motion for

Sanctions", which were affirmed by this Court on January 31, 1992. Specifically, plaintiff failed to appear for his deposition in March 1992, has failed to respond to the requests for admissions and production of documents and has failed to pay defendants the costs which have been awarded as sanctions.

Dismissal of an action for failure to cooperate in discovery is a sanction of last resort that may be imposed only if the court concludes that the failure to cooperate in discovery is due to willfulness, bad faith or fault. *Regional Refuse Systems* v. *Inland Reclamation Co.*, 842 F.2d 150 (6th Cir. 1988), citing *Patton* v. *Aerojet Ordinance Co.*, 765 F.2d 604, 697 (6th Cir. 1985). The factors which should be considered in deciding whether to dismiss include: (1) whether the refusal to cooperate in discovery has prejudiced an adversary; (2) whether less drastic sanctions were imposed or considered; (3) whether the dismissed party was warned that failure to comply could result in dismissal; (4) the degree of willfulness or culpability of the recalcitrant party; and (5) whether the actions were that of a party or his counsel. *Regional Refuse*, *supra*, and *Taylor* v. *Medtronics*, 861 F.2d 980 (6th Cir. 1988).

Without belaboring the record with all of the facts, the Court notes the following chronology regarding plaintiff's deposition. In September 1991, plaintiff was directed by his counsel not to answer certain questions during his deposition. Defendant's first motion to compel plaintiff's deposition testimony was granted in the "Order Regarding Eight Motions" dated October 31, 1991. Because there was no substantial justification for this action, plaintiff's counsel was ordered to pay reasonable costs and attorney fees incurred in connection with that first motion to compel.

Next, the deposition scheduled for November 21, 1991, was cancelled in the afternoon of November 20th because Mr. Jones was not available and/or plaintiff's counsel had a court conflict. Plaintiff's second motion to compel plaintiff's deposition was granted in an order filed January 27, 1992 and defendant was awarded costs in the amount of $1,281.94.

The deposition, next scheduled for March 4 and 5, 1992, was again cancelled the day before because plaintiff was not available. As previously mentioned, the facts surrounding this second failure to appear are set out at length in the October 9, 1992, Memorandum Opinion and Order. Sanctions of $1,170.00 were awarded to defendant in connection with this third motion to compel. Finally, the deposition rescheduled for May 11 and 12, 1992, was cancelled by defense counsel. Plaintiff's deposition has yet to be completed and none of the costs awarded to defendants have been paid.

Magistrate Pepe found that plaintiff's failure to appear at his deposition in March resulted from the gross negligence and indifference of plaintiff's counsel. Also, plaintiff had notice of the March deposition dates and either disregarded the notice or did not attempt to reschedule in a timely fashion. Finally, although plaintiff was aware of the problems that resulted when the deposition was cancelled in November, plaintiff had not been warned about the potential adverse consequences of failing to appear.

Turning to the relevant factors, there can be little doubt that defendants have been prejudiced by the inability to complete discovery and that the less drastic sanctions imposed have not been effective. In addition, plaintiff has failed to show that the failure to appear for deposition was due to "inability," rather than "willfulness, bad faith or fault," *Regional Refuse, supra.* However, without condoning the actions taken in avoidance of discovery, this Court is not satisfied that plaintiff himself had reasonable notice in March 1992 that failure to appear at the deposition could result in dismissal of his case. Therefore, defendants' motion to dismiss is DENIED.

For the sake of clarity, the Court indicates that the amount of costs and fees already awarded to defendants as sanctions total $4,241.27. This includes $300.00 awarded by the October 31, 1991 Order Granting in Part Defendants' Motion for Sanctions; $1,489.33 awarded by the October 31, 1991 Order

Regarding Eight Motions;[1] $1,281.94 awarded by the January 27, 1992 Discovery Order; and $1,170.00 awarded in the October 9, 1992 Memorandum Opinion and Order.

## CONCLUSION

For the reasons stated above, the Memorandum Opinion and Order of October 9, 1992 is **AFFIRMED** and defendants' motion to dismiss is **DENIED**. Furthermore, it is **ORDERED** that plaintiff shall appear for his continued deposition at a mutually convenient date and time, no later than January 29, 1993. In addition, to the extent that plaintiff has not yet provided the following discovery, plaintiff is **ORDERED** to:

(1) provide all existing 1982 and 1990 state, federal and local tax returns to defense counsel no later than January 13, 1993, and

(2) answer defendants' Request for Admission No. 1 and No. 2 no later than January 13, 1993, or they will be deemed to have been admitted.

Failure to appear for deposition or provide the above-ordered discovery will result in dismissal of this case.

/s/ GEORGE LA PLATA

George La Plata
U.S. District Judge

January 4, 1993
Ann Arbor, MI

[1] Defense counsel filed affidavits on November 7, 1991 and on February 7, 1992, setting forth the costs and fees incurred. Plaintiff did not file objections. Due to duplication of charges for services on October 16 and 23, 1992, 1.25 hours are deducted from the requested amounts at $190.00/hour.

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

GEORGE JONES,
*Plaintiff,*

v.

SIMON & SCHUSTER, INCORPORATED, et. al.,
*Defendants.*

C.A. No.
91-CV-60089-AA

HON. GEORGE La PLATA

**ORDER DENYING PLAINTIFF'S MOTION TO DISQUALIFY**

On September 29, 1992, plaintiff George Jones filed a motion to disqualify this Court and Magistrate Judge Steven Pepe from hearing further proceedings in this case. The motion is accompanied by the affidavit of George Jones. On October 26, 1992, defendants filed their response in opposition to the requested relief.

Plaintiff's motion is brought pursuant to 28 U.S.C. §144, which provides in part:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has personal bias or prejudice either against him or in favor of an adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

Although §144 appears on its face to require automatic disqualification upon filing of the motion and affidavit, the district judge has a duty to first examine the affidavit to determine whether it is timely and legally sufficient. *Easley* v. *University of Michigan Bd. of Regents*, 853 F.2d 1351, 1355 (6th Cir. 1988), *In re City of Detroit*, 828 F.2d 1160, n. 2 (6th Cir. 1987). The affidavit must state the facts and the reasons for

the belief that bias or prejudice exists, and the facts stated are accepted as true. *United States* v. *Story*, 716 F.2d 1088 (6th Cir. 1983).

Plaintiff contends that refusal is warranted because of the prejudice exhibited against plaintiff, the "apparent undue influence" of defense counsel, and a bias against Title VII and civil rights cases. In support of this last contention, plaintiff states that this Court previously dismissed a civil rights case entitled *Bell* v. *City of Detroit*, C.A. No. 89-CV-60166-AA, which challenged a warrantless arrest and detention as unconstitutional. However, this case number corresponds to *Michigan Bell Telephone Company* v. *Phonequest. Inc.*, which is a breach of contract action.

More specifically, plaintiff claims that bias is demonstrated by certain unfavorable discovery rulings made by Magistrate Pepe and encompassed in the "Order Regarding Eight Motions" dated October 31, 1991. Objections filed by plaintiff were considered and the Order was affirmed by this Court on January 31, 1992. Plaintiff argues that he has been denied discovery while all of defendants' demands have been granted. Concluding that the rulings make it impossible for him to prevail on his disparate treatment claim, plaintiff seeks to disqualify this Court and Magistrate Pepe.

It is well established that the alleged bias must be a personal bias, as distinguished from a judicial one, arising from the judge's background and association and not from the judge's view of the law. *United States* v. *Story*, 716 F.2d at 1090.[1] However, conclusory assertions and opinions are not sufficient to support a request for recusal. *City of Cleveland* v. *Krupansky*, 619 F.2d 576 (6th Cir. 1980).

Taking the facts stated in the affidavit as true, the alleged bias arises from the fact that certain rulings have been unfa-

[1] Likewise, a motion to disqualify brought under 28 U.S.C. §455(a) must also be predicated upon extrajudicial, rather than judicial conduct. *Easley*, 853 F.2d at 1355.

vorable to plaintiff and from the Court's view of the law.[2] Because the factual allegations do not suggest personal bias and do not involve extra judicial conduct, the affidavit is legally insufficient. *City of Cleveland, supra.* In addition, the motion is untimely as the grounds were known to plaintiff many months before this motion was filed.[3]

For the reasons stated above, plaintiff's motion to disqualify is DENIED.

/s/ GEORGE LA PLATA

December 21, 1992
Ann Arbor, MI

George La Plata
U.S. District Judge

[2] This Court does not attempt to address the merits or truth of plaintiff's charges because this Court must take the facts as true and examine them only for legal sufficiency and timeliness. However, this silence should in no way be taken as agreement that bias played any part in the rulings of the Court.

[3] In fact, a petition for writ of mandamus brought on the same grounds was denied in a Mandate, filed on March 27, 1992, which cites plaintiff to *City of Cleveland, supra.*

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

GEORGE JONES,
*Plaintiff,*

v.

SIMON & SCHUSTER, INCORPORATED, et. al.,
*Defendants.*

C.A. No.
91-CV-60089-AA

HON. GEORGE La PLATA

**ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT AND OR ORDERS**

On June 4, 1992, plaintiff George Jones filed a Motion for Relief from Judgment or Orders of October 23 (sic), 1991, and January 21, 1992. Plaintiff asks that the Court reverse or modify several discovery orders entered by Magistrate Judge Steven Pepe; specifically, the "Order Regarding Eight Motions" and the "Order Granting in Part Defendants' Motion for Sanctions", which were entered on October 31, 1991, and the "Discovery Order" entered on January 21, 1992.

In the present motion, plaintiff argues that the rulings constitute "usurpation of power", "abuse of discretion" and "denial of equal protection." The brief restates the arguments made in support of plaintiff's petition for writ of prohibition or mandamus, which was denied by the Sixth Circuit. However, plaintiff had an opportunity to lodge specific objections to the rulings and establish that they are clearly erroneous or contrary to law. L.R. 72.1(d), Fed. R. Civ. P. 72(a). In fact, the Court has already fully considered plaintiff's timely objections to the discovery orders under the appropriate standard and affirmed the challenged rulings. Therefore, plaintiff's motion for relief from these discovery orders is DENIED.

/s/ GEORGE La PLATA

George La Plata
U.S. District Judge

August 24, 1992
Ann Arbor, MI

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1994

GEORGE JONES,
*Petitioner*,

v.

SIMON & SCHUSTER, INC., and SILVER BURDETT & GINN,
*Respondents*

## PROOF OF SERVICE

Nadia L. Davis certifies that on the 13th day of June, 1994, she served **Petition for Writ of Certiorari and Proof of Service** upon counsel for respondents, Virginia F. Metz, Esq., at counsel's address at 150 W. Jefferson, Suite 900, Detroit, Michigan 48226, by placing same in an envelope so addressed to her and depositing said envelope in a United States Mail receptacle with first-class postage fully prepaid thereon.

I declare that the above statements are true to the best of my information, knowledge and belief. MCR 2.114(A)(2)(b).

/s/ NADIA L. DAVIS
Nadia L. Davis

## V. DEPOSITIONS AND DISCOVERY

**Rule 26. General Provisions Governing Discovery.**

(a) DISCOVERY METHODS. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) DISCOVERY SCOPE AND LIMITS. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

**Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes.**

(a) SCOPE. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) PROCEDURE. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons

for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) PERSONS NOT PARTIES. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

**34.1 References**

4A Moore's Federal Practice, Chapter 34.

2B Bender's Federal Practice Forms, Rule 34, Form No. 3035, *et seq.*

12, 12A Bender's Forms of Discovery, Rule 34.

2 Moore's Manual—Federal Practice and Procedure, § 15.10.

3 Moore's Manual—Federal Practice Forms, Form No. 15:67, *et seq.*

**34.2 History of Rule**

**[1]—General History**

Rule 34 was amended in 1946 in a few particulars; and then completely revised in 1970. Subdivision (b) was amended in 1980.

In 1987, subdivision (a) was amended to eliminate all gender-specific language.

**[2]—1980 Amendment to Rule 34(b)**

The 1980 amendment to Rule 34(b) deals with the manner in which documents to be produced should be organized.

**[3]—1987 Amendment to Subdivision (a)**

Subdivision (a) was amended, effective August 1, 1987, as follows (matter stricken out is in brackets; new matter is in italics):

(a) SCOPE. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on [his] *the requestor's* behalf, to. . . .

**Rule 37. Failure To Make or Cooperate in Discovery: Sanctions.**

(a) MOTION FOR ORDER COMPELLING DISCOVERY. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the

motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) FAILURE TO COMPLY WITH ORDER.

(1) *Sanctions by Court in District Where Deposition Is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action Is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action

in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) EXPENSES ON FAILURE TO ADMIT. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it

finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) FAILURE OF PARTY TO ATTEND AT OWN DEPOSITION OR SERVE ANSWERS TO INTERROGATORIES OR RESPOND TO REQUEST FOR INSPECTION. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

[(e) SUBPOENA OF PERSON IN FOREIGN COUNTRY.] (Abrogated)

(f) (Repealed, eff. October 1, 1981)

(g) FAILURE TO PARTICIPATE IN THE FRAMING OF A DISCOVERY PLAN. If a party or a party's attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for

hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

**37.1 References**

4A Moore's Federal Practice, Chapter 37.

2B Bender's Federal Practice Forms, Rule 37, Form No. 3064, *et seq.*

11, 14A Bender's Forms of Discovery, Rule 37.

2 Moore's Manual—Federal Practice and Procedure, § 15.13.

3 Moore's Manual—Federal Practice Forms, Form No. 15:91, *et seq.*

**37.2 History of Rule**

**[1]—In General**

Prior to the 1970 revision the only change made to Rule 37 was a formal amendment to subdivision (e) in 1948, which substituted the Judicial Code's statutory reference, "Title 28, U.S.C. § 1783," for the earlier and superseded statutory citation relevant to letters rogatory.

Rule 37 was more extensively amended in 1970 and again in 1980. In 1981, subdivision (f) was repealed. In 1987, subdivisions (a), (b), (c), (d) and (g) were amended to eliminate all gender-specific language.

**[2]—1987 Amendment to Subdivision (a)**

Subdivision (a) was amended, effective August 1, 1987, as follows (matter stricken out is in brackets; new matter is in italics):

(a) MOTION FOR ORDER COMPELLING DISCOVERY. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

• • •

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before [he applies] *applying* for an order.

• • •

Supreme Court, U.S.
FILED
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No. 94-51

# In The
# Supreme Court of the United States

October Term, 1994

**George Jones,**
*Petitioner,*

v.

**Simon & Schuster, Inc., and**
**Silver, Burdett & Ginn,**
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

Virginia F. Metz*
Bruce L. Sendek
**Butzel Long**
150 West Jefferson, Suite 900
Detroit, Michigan 48226-4430
(313) 225-7000
*Attorneys for Respondents*

*Counsel of Record

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## QUESTION PRESENTED

Whether this Court should deny certiorari to the United States Court of Appeals for the Sixth Circuit, which affirmed that the district court properly exercised its discretion in dismissing pursuant to Federal Rule of Civil Procedure 37?

## STATEMENT PURSUANT TO RULE 29.1

Simon & Schuster, Inc. is a wholly-owned subsidiary of PCI's Holdings Corporation, which is a wholly-owned subsidiary of Paramount Communications, Inc., which is a wholly-owned subsidiary of Viacom, Inc. Silver Burdett & Ginn, Inc. is a wholly-owned subsidiary of Simon & Schuster, Inc.

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## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit was not released for publication but is reproduced in full in Petitioner's Appendix at A-1. The Opinion of the United States District Court for the Eastern District of Michigan was not released for publication but is reproduced in full in Petitioner's Appendix at B-2.

## SUMMARY OF ARGUMENT

Petitioner George Jones seeks review of the Sixth Circuit Court of Appeals' March 17, 1994 affirmance of an order dismissing his complaint. The district court dismissed under Federal Rule of Civil Procedure 37(b) as a result of Jones' repeated defiance of the district court's orders to provide discovery.

The pertinent issue on appeal was whether the district court abused its discretion in dismissing the complaint. The Sixth Circuit properly recognized that such orders are reviewable only for an abuse of discretion, citing *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976). The Sixth Circuit concluded that the record demonstrated that for nearly two years, Jones and his counsel deliberately refused to comply with discovery orders and that the district court properly dismissed as a sanction of last resort.

Jones now petitions for a writ of certiorari for reasons that are practically incoherent and plainly disjointed. Essentially, Jones' petition is a diatribe that hardly touches on the Sixth Circuit's March 17, 1994 opinion. Instead, Jones expounds at length on extraneous matters such as liberal discovery standards under the Federal Rules, the district court's alleged failure to abide by Federal Rule of Civil Procedure 26, respondents' alleged failure to provide discovery to Jones, the concept of equal protection, and judicial responsibility in district courts.

Likewise, Jones' list of "questions presented" is not connected to the Sixth Circuit's opinion. In ad hominem fashion, the so-called issues summarize Jones' complaints about the magistrate judge, the district court's alleged failure to enforce discovery against respondents, the district court's denial of a motion for recusal, and petitioner's alleged denial of due process and equal protection. These matters are unrelated to the Sixth Circuit opinion Jones is requesting the Supreme Court to review. Jones simply does not focus on the fundamental question of whether or not the dismissal was a proper exercise of the district court's discretion. Based on the record in the district court, Jones' Petition for Writ of Certiorari should be denied.

## STATEMENT OF THE CASE

George Jones was employed by Silver, Burdett & Ginn to sell textbooks until November 1, 1989, at which time he was employed as a textbook salesperson for Globe Book Company, Inc. Both companies are affiliates of Simon & Schuster, Inc. On December 18, 1989, Jones' employment was terminated because he had engaged in substantial improprieties in obtaining textbooks orders. Jones filed suit in March, 1991, to contest the termination.

Throughout the litigation, Jones repeatedly failed to respond to appropriate discovery requests, to answer certain deposition questions, to appear for properly noticed depositions and to comply with discovery orders issued by the magistrate judge and district court. Jones also filed three improper interlocutory appeals with the Sixth Circuit, was sanctioned by the magistrate judge and district court for filing a frivolous motion, had costs assessed against him on several occasions due to abuses of the discovery process, and brazenly disobeyed applicable court rules.

Jones' continuous refusal to comply with the district court's discovery orders caused defendants to file two motions to dismiss. The first motion was denied by the district court, but Jones was strongly warned to comply with specified parts of the district court's prior

discovery orders by a date certain or have his case dismissed. When Jones failed to comply with this order as well, defendants filed a second motion to dismiss. This motion was granted by the district court and affirmed by the Sixth Circuit.

The procedural morass created by Jones' tactics makes it difficult to provide a chronological discussion of the various motions, orders and appeals in this case. For organization, defendants will divide the discussion into three sections. The first section will address the four discovery rulings of the magistrate judge. The second section will address the various appeals taken by Jones to both the district court and to the Sixth Circuit and the orders issued by the district court. The third section will discuss the motions to dismiss and the ultimate dismissal of this case by the district court.

## A. The Magistrate Judge's Orders

### 1. The Magistrate Judge's First Order

Shortly after defendants answered the complaint, Jones filed a motion for more definite statement. Since Jones had failed to comply with the local court rule that requires an attorney to seek concurrence before filing a motion, the magistrate judge denied Jones' motion and directed Jones' counsel to confer with defense counsel regarding the

substance of his motion. In addition, the magistrate judge ruled that defendants could bring a motion for costs and fees after the parties consulted. Four months then passed, and Jones took no action to confer with defense counsel regarding his motion. Defendants accordingly filed a motion seeking to recover their costs and attorney's fees incurred in responding to Jones' motion. The magistrate judge entered an order awarding defendants $300 in Rule 11 sanctions. The magistrate judge based his ruling on the fact that Jones' counsel had filed a frivolous motion and violated Rule 11 of the Federal Rules of Civil Procedure. Despite the issuance of this order, the costs awarded were never paid.

### 2. The Breakdown in Discovery and the Magistrate Judge's Second Order

Defendants first filed a discovery motion after Jones refused to answer certain questions during his deposition.[1] Defendants' second discovery motion sought to compel Jones to answer requests for admissions. Defendants' third discovery motion sought to compel Jones to

[1] The Jones deposition, which took place on July 24 and 25, 1991, was not concluded on those dates. The continuation of Jones' deposition was scheduled for September 17 and 18, 1991, but had to be canceled because Jones filed a motion seeking to terminate his deposition, which was ultimately denied by the magistrate judge. As will be discussed below, all subsequent attempts to schedule Jones' deposition were scuttled when Jones refused to appear. As a consequence, Jones' deposition was never continued or completed prior to the dismissal of this case.

fully respond to defendants' interrogatories and document requests. All three of these discovery motions were referred to the magistrate judge.

On October 31, 1991, the magistrate judge issued an order resolving all of the pending discovery motions. Jones was ordered to answer defendants' questions at the continuation of his deposition and defendants were awarded $1,092.50 in costs payable by Jones' counsel because Jones' counsel had improperly directed Jones not to answer the deposition questions. The magistrate judge also directed Jones to respond to defendants' requested admissions and several of defendants' interrogatories and document requests and awarded defendants additional costs of $633.33 payable by Jones' counsel because "there was no substantial justification" for Jones' refusal to answer defendants' discovery requests.

### 3. Another Breakdown in Discovery and the Magistrate's Third Order

As a result of the volume of discovery motions that had been filed, which held up the continuation of Jones' deposition until the motions could be resolved, the district court set a new discovery cutoff of February 26, 1992. Defendants then noticed the continuation of Jones' deposition for November 21, 1991. Jones canceled this deposition at the last moment, after defendants' representative had flown from Chicago to Detroit to attend the deposition. Defendants therefore filed a **second**

motion seeking to compel Jones' deposition and for costs. On January 21, 1992, the magistrate granted this motion and ordered Jones' counsel to pay defendants $1,281.94 in costs no later than February 20, 1992 unless Jones' counsel submitted a specified affidavit. Jones' counsel never submitted the affidavit. As with the prior award of costs, the costs remain unpaid.

At this point in the proceedings, the district court extended the discovery cutoff until June 26, 1992 due to the fact that discovery had been on hold until the pending motions were resolved.

**4. Discovery Breaks Down Again and the Magistrate's Fourth Order**

After prevailing on their second motion to compel deposition, defendants re-noticed the continued deposition of Jones for March 4, 1992. Once again, Jones did not appear for his properly noticed deposition. Defendants accordingly filed a **third** motion seeking to compel Jones' deposition testimony and for costs.

On April 22, 1992, the magistrate judge conducted a hearing regarding defendants' third motion to compel Jones' deposition testimony and issued a ruling from the bench in favor of defendants regarding the substantive issues raised by their motion. In addition, the magistrate judge scheduled an evidentiary hearing with Jones present to determine

whether Jones or his counsel would be required to pay defendants' costs because Jones had again failed to appear for a properly noticed deposition.

On October 9, 1992, after conducting the evidentiary hearing, the magistrate judge issued his fourth order. In his fourth order, the magistrate judge once again ordered Jones to appear for his deposition. In the same order, the magistrate judge awarded defendants $1,170 in costs payable by November 7, 1992 and ruled that Jones and his counsel could decide among themselves how to apportion the payment. Just as with every other order issued by the magistrate judge, the costs awarded in this order have never been paid.

5. **Summary**

In summary, the magistrate judge issued four discovery orders in this case, none of which has been complied with by Jones:

1. An October 31, 1991 order holding that Jones had filed a frivolous motion for more definite statement and awarding defendants $300 in costs as Rule 11 sanctions.

2. An October 31, 1991 order compelling Jones to appear for his deposition and to respond to deposition questions, certain interrogatories and admissions and awarding defendants $1,092.50 and $633.33 in costs.

3. A January 21, 1992 order compelling Jones a second time to appear for his deposition and awarding defendants $1,281.94 in costs.

4. An October 9, 1992 order compelling Jones to appear a third time for his deposition and awarding defendants $1,170 in costs.

## B. Jones' Objections to the Magistrate's Orders and his First Two Interlocutory Appeals to the Sixth Circuit

Jones filed objections with the district court regarding all four of the magistrate judge's orders summarized above. Defendants will discuss the district court's rulings on these objections, as well as the motions and interlocutory appeals that followed, in the order in which they occurred.

### 1. The District Court's First Order and Jones' First Sixth Circuit Appeal

On January 22, 1992, the district court judge issued an order affirming the magistrate judge's first two orders compelling discovery and awarding $300, $1,092.50 and $633.33 in costs. Accordingly, Jones' counsel had to pay defendants all of the costs awarded by the magistrate judge's first two orders by February 21, 1992 and to provide seven types of discovery materials to defendants during February of 1992. Despite the issuance of this order, the awarded costs have never been paid, and the discovery mandated by the order was never provided.

Jones responded to the district court's first order by filing a Petition for Writ of Prohibition and/or Writ of Mandamus dated February 20, 1992 with the Sixth Circuit. This petition also addressed the magistrate judge's

third discovery Order dated January 21, 1992, which had been appealed to the district court but not yet decided. In his petition, Jones asked the Sixth Circuit to reverse all of the discovery rulings issued at that time in defendants' favor and to remove the district court judge and the magistrate judge from his case. On March 24, 1992, the Sixth Circuit issued an order denying Jones' petition. (Petitioner's Appendix A-10)

**2. The District Court's Second Order**

As indicated, Jones also filed objections to the magistrate judge's third discovery order, which directed Jones a second time to appear for his deposition and awarded defendants $1,281.94 in costs. Jones' objections addressed not only the magistrate judge's third discovery order, but also the magistrate judge's first discovery orders, even though they had already been affirmed by the district court. On June 29, 1992, the district court issued an order affirming the third discovery order and requiring Jones' counsel to pay defendants the $1,281.94 in costs awarded in the magistrate judge's third order by July 29, 1992.

**3. Jones' Motion for Relief and the District Court's Third Order**

Having failed to convince either the district court or the Sixth Circuit to overturn the magistrate judge's discovery orders, Jones filed a Motion for Relief from Judgment or Orders with the district court on June

4, 1992. In this motion, Jones again sought relief from two prior discovery Orders. First, Jones asked the district court for a third time to reverse the magistrate judge's second order dated October 31, 1991 even though this order had already been reviewed and affirmed by the district court twice and even though Jones had not filed a motion with the district court in a timely fashion seeking rehearing. Second, Jones asked the district court to reverse the magistrate judge's third order dated January 21, 1992, which Jones had already appealed to the district court but which at that point had not yet been decided.

The district court denied Jones' motion for relief on August 24, 1992. (Petitioner's Appendix B-12) By issuing this order, the district court once again denied Jones' attempt to set aside the magistrate judge's first three discovery orders with which Jones had consistently refused to comply. Notwithstanding the magistrate judge's order, however, no money was paid to defendants, and Jones still failed to provide the mandated discovery.

**4. Jones' Second Sixth Circuit Appeal and Motion to Recuse the District Court Judge and the Magistrate Judge**

Jones responded to the district court's third order dated August 24, 1992 by filing a **second** interlocutory appeal with the Sixth Circuit on September 11, 1992. The purpose of this appeal was to circumvent the

district court's first and third orders and thereby reverse the magistrate judge's second and third discovery orders. Defendants filed a motion to dismiss this appeal for lack of jurisdiction and the Sixth Circuit agreed:

> The orders that plaintiff seeks to have the court review are essentially discovery orders. It is well established in this circuit that discovery orders are non-final, non-appealable orders. (Petitioner's Appendix A-8)

In addition to filing his second Sixth Circuit appeal, Jones also filed a motion on September 29, 1992 with the district court seeking the recusal of the district court judge and the magistrate judge. In essence, this motion was a repackaged, retitled version of the petition that Jones had earlier filed with the Sixth Circuit in his first appeal dated February of 1992. The district court denied Jones' motion seeking recusal on December 21, 1991. (Petitioner's Appendix B-9)

### C. Defendants' Motions to Dismiss and Jones' Third Interlocutory Appeal

#### 1. The District Court's Denial of the First Motion to Dismiss

On March 6, 1992 -- after Jones had twice failed to proceed with his deposition, failed to comply with the magistrate judge's first three orders, and failed to comply with the seven discovery mandates affirmed in the district court's order dated January 22, 1992 -- defendants filed their first motion to dismiss.

On January 4, 1993, the district court denied defendants' motion to dismiss but affirmed the magistrate judge's fourth discovery order dated October 9, 1992. (Petitioner's Appendix B-4) Although ruling in Jones' favor regarding the motion to dismiss, the district court stated:

> Turning to the relevant factors, there can be little doubt that defendants have been prejudiced by the inability to complete discovery and that the less drastic sanctions imposed have not been effective. In addition, plaintiff has failed to show that the failure to appear for deposition was due to "inability," rather than "willfulness, bad faith or fault," *Regional Refuse, supra.*
>
> * * *
>
> For the sake of clarity, the Court indicates that the amount of costs and fees already awarded to defendants as sanctions total $4,241.27.

In this same order, the district court required Jones to provide the following discovery:

> (1) provide all existing 1982 and 1990 state, federal and local tax returns to defense counsel no later than January 13, 1993, and
>
> (2) answer defendants' Request for Admission No. 1 and No. 2 no later than January 13, 1993, or they will be deemed to have been admitted.
>
> Failure to appear for deposition or provide the above-ordered discovery will result in the dismissal of this case. (emphasis added)

## 2. Defendants' Second Motion to Dismiss and Jones' Third Sixth Circuit Appeal

Jones also failed to comply with the discovery ordered by the district court on January 4, 1993. Defendants accordingly filed a second motion to dismiss dated January 19, 1993.[2]

In response to defendants' motion, Jones filed a brief in the district court stating for the first time that he had filed a **third** interlocutory appeal with the Sixth Circuit regarding the district court's January 4, 1993 order. Jones filed a separate brief with the district court in response to defendants' motion in which he did not even attempt to assert that he had complied with the district court's January 4, 1993 order.

Jones' third interlocutory appeal to the Sixth Circuit was an attempt to reverse those parts of the district court's January 4, 1993 order that had (1) affirmed the magistrate judge's fourth discovery order dated October 9, 1992 and (2) ordered Jones to provide discovery to defendants by January 13, 1993. On March 11, 1993, the Sixth Circuit issued an order granting defendants' motion to dismiss Jones' third appeal. (Petitioner's Appendix A-6) The Sixth Circuit stated in its order:

[2] In this motion, defendants pointed out that not only had Jones not provided the discovery ordered on January 4, 1993, but also that all of the other discovery that had been mandated by the magistrate judge and district court had likewise never been provided by Jones.

> The order which plaintiff seeks to have this court review is a non-final, non-appealable discovery order. * * * The court notes that this is the third time plaintiff has been before the court seeking review of non-final orders. * * * Plaintiff is cautioned to consider carefully whether appellate jurisdiction exists prior to filing another notice of appeal in this action.

### 3. The District Court's Dismissal Order

On February 26, 1993, the district court issued an order dismissing Jones' lawsuit. (Petitioner's Appendix B-2) In this order, the district court stated:

> Plaintiff does not deny that he has not provided the ordered discovery and does not represent that it will be produced or that he will appear for his deposition. Instead, on January 20, 1993, plaintiff filed a Notice of Appeal from this Court's January 4, 1993 Order. It is apparent that this is merely an attempt to further delay progress in this case. * * * [P]laintiff is on notice that this is not a proper appeal. * * * While a proper notice of appeal generally divests the district court of jurisdiction, the Sixth Circuit has held that a notice of appeal from a plainly non-appealable order may be ignored by the district court.

It is this order that was affirmed by the Sixth Circuit on March 17, 1994 and is the subject of this petition. (Petitioner's Appendix A-1)

## REASONS FOR DENYING THE WRIT

The only issues properly addressed by this petition are those arising out of the Sixth Circuit March 17, 1994 opinion that affirmed dismissal of Jones' lawsuit after Jones repeatedly failed to comply with several

orders of the magistrate judge and district court and after Jones filed numerous frivolous motions and appeals with both the district court and the Sixth Circuit.

## A. The Proper Standard of Review

It is well-established law that district court orders of dismissal issued under Federal Rule of Civil Procedure 37 are reviewable by appellate courts only for an abuse of discretion. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642, (1976); *Regional Refuse Systems, Inc. v. Inland Reclamation Co.*, 842 F.2d 150, 154 (6th Cir. 1988); *Taylor v. Medtronics, Inc.*, 861 F.2d 980, 985 (6th Cir. 1988); *Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067, 1073 (6th Cir. 1990). Defendants submit that the facts of this case applied to the controlling law clearly demonstrate that there was no abuse of discretion.

Three Sixth Circuit cases set forth the factors that are to be considered when an order of dismissal is reviewed by an appellate court:

1. Whether the dismissed party's failure to comply with the district court's order was due to willfulness/bad faith/fault or an inability to comply;

2. Whether the adversary was prejudiced by the dismissed party's failure to cooperate in discovery;

3. Whether the dismissed party was warned that failure to cooperate could lead to dismissal; and

4. Whether less drastic sanctions were imposed or considered before dismissal was ordered.

*Bank One of Cleveland*, 916 F.2d at 1073, 1079; *Taylor*, 861 F.2d at 986; *Regional Refuse Systems*, 842 F.2d at 153, 155.

**B. The Facts Establish that Jones Acted Egregiously and that Jones' Conduct Was Willful and in Bad Faith**

Jones and his counsel have demonstrated a complete disregard for discovery rules, local rules, appellate rules and court orders. These actions are particularly egregious because they happened, not just once, but repeatedly despite the magistrate judge's and district court's warnings.

Jones' misconduct throughout this litigation fully supports the district court's order of dismissal. The order was not entered until Jones had been given repeated opportunities to comply with the court rules and orders. Likewise, the order was not entered until after Jones was sanctioned, repeatedly subjected to Rule 37 costs and warned of the consequences of failing to comply with the court rules and orders. There is no doubt under the circumstances that Jones' conduct was willful and in bad faith and not the result of inability to comply, which Jones has never claimed.

As indicated in the Statement of Facts, Jones' misconduct began almost immediately with the filing of a procedurally and substantively

defective motion for more definite statement regarding defendants' answer. Not only did Jones violate the local court rule by not seeking the concurrence of defense counsel before filing his motion, but he also ignored Federal Rule of Civil Procedure 12(e), which does not permit the filing of such a motion regarding an answer. He also did not follow the magistrate judge's direction to confer with defense counsel. Defendants were awarded $300 in Rule 11 sanctions as a "deterrent against plaintiff's counsel filing frivolous motions in the future." Unfortunately, this very early warning from the magistrate judge did nothing to deter Jones from engaging in a continuing pattern of misconduct.

Thereafter, Jones improperly refused to respond to deposition questions and then failed to proceed with his deposition notwithstanding the filing of three motions to compel his deposition, all of which resulted in rulings in favor of defendants by both the magistrate judge and the district court. Jones also refused to answer request for admissions, to provide certain tax documents and to respond to several other discovery requests, again in violation of orders entered by both the magistrate judge and the district court. The magistrate judge's orders on all of these discovery issues resulted in the imposition of substantial costs, but Jones

still did not modify his pattern of misconduct. The costs awarded were also never paid.

Jones' efforts to overturn the magistrate judge's rulings further establish misconduct. Jones filed objections with the district court regarding all four of the magistrate judge's discovery orders. If this were the only steps taken by Jones, defendants would obviously not object because Jones had the right to file objections and to have the rulings reviewed by the district court. But Jones did not stop there. Instead, when the district court affirmed the magistrate judge's discovery orders, Jones still refused to comply with the orders. In addition, Jones took a series of manifestly impermissible steps that were designed to continue his disruption of the discovery process:

1. Jones filed an interlocutory appeal with the Sixth Circuit in the form of a Petition for Writ of Prohibition and/or Writ of Mandamus seeking to reverse all of the discovery orders in defendants' favor and to have the district court judge and magistrate judge removed from the case.

2. When this Sixth Circuit rejected Jones' petition, noting that his appeal was procedurally defective and that he had provided no basis for removing the district court judge and the magistrate judge from the case, Jones responded by filing a motion for rehearing that was likewise denied.

3. Jones then again attempted to overturn these initial discovery rulings by appealing them again to the district court when he filed objections regarding the magistrate judge's third discovery order.

4. Then, when the district court reiterated its earlier rulings and affirmed the third discovery order, Jones filed a Motion for Relief from Judgment or Orders which asked the district court for a third time to overturn the magistrate judge's discovery rulings. The district court refused, but Jones was still undeterred.

5. Jones responded by filing a second procedurally improper interlocutory appeal with the Sixth Circuit that essentially challenged the same orders as his first appeal and that was again dismissed. He also filed a motion with the district court to recuse the district court judge and the magistrate judge, a motion that likewise mirrored his first appeal to the Sixth Circuit and was denied by the district court.

Jones' trail of discovery and procedural abu s did not go unnoticed by the district court. At first, the district court mildly admonished Jones in June of 1992 by pointing out that his repeated attempts to overturn the same orders of the magistrate judge had already been rejected by the district court. The district court reiterated this point in rejecting Jones' motion for relief two months later. Then, when Jones raised the same issues a third time, the district court underscored Jones' continuing misconduct by noting that the same case law that supported its denial of Jones' motion to recuse had already been provided to Jones by the Sixth Circuit when it dismissed his first interlocutory appeal.

Jones still did not get the message. He continued to refuse to comply with the orders regarding admissions, documents and interrogatory

answers, and he continued to refuse to proceed with his deposition. Defendants therefore had no alternative but to file a motion to dismiss.

The district court denied this motion on January 4, 1993 and gave Jones yet another chance to comply with the magistrate judge's and district court's orders. Jones was given a date certain by which he had to comply with the discovery previously ordered by the magistrate judge and district court. The district court also told Jones in clear and unequivocal language that his case would be dismissed if he failed to comply with this deadline.

Jones once again ignored the deadline and once again tried to avoid compliance by filing a procedurally defective interlocutory appeal, after the district court deadline had been missed. This appeal to the Sixth Circuit was again dismissed with an admonishment that this was Jones' third improper appeal.

After defendants filed their second motion to dismiss based, Jones did not even attempt to argue that he had not violated the terms of the January 4, 1993 order. Thus, the district court properly dismissed the case.

At the time of dismissal, Jones had over a sixteen-month period consistently refused to comply with the magistrate judge's four discovery

orders; he had appealed all four of the magistrate judge's orders to the district court; the district court had denied all four of Jones' appeals; Jones had refused to comply with any of the district court's orders; Jones had filed three unmeritorious, interlocutory appeals with the Sixth Circuit, all of which had been denied; Jones had filed one motion for rehearing with the Sixth Circuit that had been denied; Jones had filed a motion for relief with the district court that repeated earlier-filed motions with both the Sixth Circuit and the district court; Jones had filed a motion to recuse with the district court that repeated his first appeal to the Sixth Circuit; and Jones had refused to comply with the district court's final order setting a January 13, 1993 discovery deadline. Moreover, at this same point in time, Jones had refused to comply with any of the orders awarding defendants a total of $4,241,27 in costs.

One of the factors considered by the Sixth Circuit was whether Jones' failure to comply with the district court's orders was due to inability or was the result of his own willfulness, bad faith or fault. The burden of proof was on Jones to establish that his failure to comply with the district court's orders was due to inability. *Taylor*, 861 F.2d at 987. If the repeated filing of procedurally and substantively deficient motions and appeals, as well as the repeated refusal to comply with court orders

notwithstanding admonishments and a clear warning regarding the consequences of noncompliance, does not constitute fault, bad faith or willfulness, it is not clear what does. Significantly, Jones has never claimed that he was not able to comply with the orders.

In *National Hockey League*, 427 U.S. at 640, this Court found that there was no abuse of discretion in dismissing a lawsuit where the district court had concluded that after "seventeen months where crucial interrogatories remained substantially unanswered . . . the court must and does conclude that the conduct of the plaintiffs demonstrated the callous disregard of responsibilities counsel owe to the court and to their opponents." This Court reversed the Third Circuit and held:

> [T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent. *Id.* at 643.

In the instant case, where crucial discovery was not completed over a sixteen-month time period, the *National Hockey League* case is directly on point.

In *Bank One of Cleveland*, where the defendants were proceeding pro se, the Sixth Circuit upheld the entry of a default judgment against the defendants using the same analysis it utilizes for dismissing a

plaintiff's action. In allowing the default to stand, the court noted -- exactly parallel to the facts in this case -- that the defaulted defendants did not "allege an inability to comply with the bank's court-sanctioned discovery requests." *Bank One of Cleveland*, 916 F.2d at 1079. The Sixth Circuit therefore found that the defendants' "repeated failure to appear on numerous occasions suggests their 'willfulness, bad faith, or fault.'" *Id.*

The Sixth Circuit upheld the dismissal of plaintiffs' complaint in *Regional Refuse Systems*. After discussing the distinction between an inability to comply with a court order as compared with a bad faith refusal to comply with a court order, the Six Circuit concluded that it was the thrust of the case law "to presume that, if a party has the ability to comply with a discovery order and does not, dismissal is not as abuse of discretion." *Regional Refuse Systems*, 842 F.2d at 154. See also *Taylor*, 861 F.2d at 985. The same presumption should apply in the instant case.

**C. Defendants Were Clearly Prejudiced**

It is clear that defendants were greatly prejudiced by Jones' misconduct. The district court properly found in its order that "there can be little doubt that defendants have been prejudiced by the inability to complete discovery . . . ." Similarly, the record amply reflects that Jones'

misconduct stopped defendants from completing Jones' deposition despite the passage of sixteen months and that defendants were unable to complete any other discovery during this same time period due to Jones' refusal to comply with repeated orders requiring discovery. In addition to the fact that discovery abruptly halted and never resumed, defendants were also seriously prejudiced by being put to a great deal of expense. Jones' misconduct also potentially imposed significant additional interest costs on defendants by needlessly extending the litigation.

In *Taylor*, 861 F.2d at 986, the Sixth Circuit court affirmed the dismissal of an action under parallel circumstances, explaining:

> [I]t is clear that the defendants were materially prejudiced by the plaintiffs' repeated failure to make their expert available for deposition. Not only were the defendants forced to incur additional legal expenses in attempting to obtain the deposition, but also . . . the dilatory tactics of the plaintiffs effectively prevented the defendants from engaging in further discovery after the deposition because of the close proximity to the trial date.

Similarly, in *Regional Refuse Systems*, 842 F.2d at 155, the Sixth Circuit upheld the dismissal of an action in circumstances similar to the instant case:

> Certainly the many defendants were put to a great deal of expense, to little avail, in the efforts to procure Dzina's attendance at his own deposition, and to wring some substance out of his vague and evasive answers. The defendants know little more now than they did when they

> began about how the plaintiffs intended to prove their case, and the prejudice caused by Dzina's conduct is therefore clear.

In this case, defendants likewise know little more about Jones' claims and the facts surrounding those claims than they did when this lawsuit was first filed.

Defendants' opportunity to gather facts was greatly diminished by Jones' conduct. Memories of witnesses will have faded, witnesses who left the defendants or worked for other companies will become increasingly difficult to locate, documents may have disappeared or been destroyed, and the like. The trail is clearly quite cold and has been made so by Jones' misconduct.

**D. Jones Was Explicitly Warned**

The record is likewise clear that Jones was amply warned that his failure to cooperate could lead to the dismissal of his case. In its order dated January 4, 1993, the district court stated: "Failure to appear for deposition or provide the above-ordered discovery will result in dismissal of this case." Moreover, in its final order, the district court properly noted that its order dated January 4, 1993 had "specifically advised that failure to cooperate in discovery would result in dismissal." Nothing more than this clear language is required by the case law.

In this regard, the Sixth Circuit stated:

> As the district court acknowledged, the dismissal of an action is a sanction of last resort." *Regional Refuse Systems, Inc., v Inland Reclamation Co.*, 842 F2d 150, 153 (6th Cir. 1988). Where, however, "a party has the ability to comply with a discovery order and does not, dismissal is not an abuse of discretion." *Id.* at 154. (Petitioner's Appendix A-1)

**E. <u>Less Drastic Sanctions Were First Imposed</u>**

Another factor that is often considered is whether the district court imposed or considered a less drastic sanction than dismissal. In the instant case this obviously occurred.

The magistrate judge awarded Rule 11 sanctions in favor of defendants specifically as a "deterrent against" the filing of additional frivolous motions by Jones. In addition, the magistrate judge awarded substantial costs in favor of defendants on several occasions because there was no justification for the delay that was occurring regarding discovery. Moreover, in all instances, the district court affirmed these rulings by the magistrate judge. After Jones and his counsel consistently refused to comply with any order issued or to pay defendants any of the money awarded to them, the district court had no realistic alternative but to dismiss this action in order to preserve the integrity of the federal courts.

The prior decisions of the Sixth Circuit underscore the propriety of the dismissal of Jones' complaint. Affirming the dismissal of an action when the plaintiffs failed to proceed with discovery, the Sixth Circuit noted with approval in *Taylor*, 861 F.2d at 986 -- parallel to the instant case -- that the district court had previously imposed the lesser sanction of costs. Moreover, in *Regional Refuse Systems*, 842 F.2d at 156, the district court did not even consider a lesser sanction than dismissal, and there was a finding on appeal that the misconduct was executed with a "veneer of good intentions," which is certainly not present in this case. Nonetheless, this court affirmed the dismissal, explaining:

> It has been held that "[t]he district court . . . enjoys authority to impose this sanction even where 'a less drastic sanction might have been entertained.'"
>
> * * *
>
> While it would be inappropriate to dismiss without considering the severity of this sanction and the availability of lesser sanctions, it is not an abuse of discretion to dismiss, even though other sanctions might be workable, if dismissal is supportable on the facts. Dismissal is generally imposed only for egregious misconduct, such as **repeated** failure to appear for deposition . . . . Id. at 155. (Emphasis added).

Finally, in *Bank One of Cleveland*, 916 F.2d at 1079, the Sixth Circuit upheld a default judgment that had been entered against the defendants after finding that their lack of response to the district court's

order to compel discovery "demonstrates the futility of any lesser sanctions."

F. **The Sixth Circuit Properly Explained Its Rationale**

This is clearly not a case in which there is any doubt as to the substantial reasons why the district court dismissed Jones' lawsuit. The Sixth Circuit's opinion includes a detailed summary of the events which led to dismissal. Further, the record establishes that the district court made a specific finding that defendants had been prejudiced, that less drastic sanctions had been unsuccessfully imposed and that this was not a case of a plaintiff's inability to comply with court orders. Finally, in its last order, the district court judge also found that Jones did not deny that he had not provided the court-mandated discovery, that Jones did not represent that he would comply with any court order and that Jones had attempted to further delay the case by filing a frivolous third appeal with the Sixth Circuit instead of providing the mandated discovery.

G. **There Is No Merit to Jones' Claims**

Jones' petition does not address any of the factors relevant to the issue on appeal and does not provide any reason why the order of dismissal should be overturned. The reason for these omissions is clear -- there is nothing Jones can say in his favor. As the petitioner, it is Jones'

burden to persuade the Supreme Court that there exists a compelling reason to grant his writ. He clearly has not, and cannot, do so.

## CONCLUSION

Respondents submit that there is no reason for the Supreme Court to review the Sixth Circuit's opinion and that Jones' petition should be denied.

Respectfully submitted,

**BUTZEL LONG**

VIRGINIA F. METZ*
BRUCE L. SENDEK
Suite 900
150 West Jefferson
Detroit Michigan 48226-4430
(313) 225-7000

**Attorneys for Respondents**

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*Counsel of Record